Supreme Court, U.S.
FILED

01 937 DEC 21 2001

OFFICE OF THE CLERK

No. ___

IN THE

Supreme Court of the United States

KARIN SKOLD VAN SLYKE,
Petitioner,

v.

NORTHROP GRUMMAN CORPORATION.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

DOUGLAS B. HURON *
PHILIP J. SIMON
HELLER, HURON, CHERTKOF
LERNER, SIMON & SALZMAN
1730 M Street, N.W.
Suite 412
Washington, DC 20036
(202) 293-8090

* Counsel of Record

Attorneys for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

50PP

QUESTIONS PRESENTED

1. Whether an employer who admittedly did not consider a female candidate for promotion, and who was not motivated by comparative qualifications at the time of the decision to promote a man, may respond to the woman's prima facie showing of discrimination under *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), by asserting that the man had superior qualifications.

2. Where the only woman in a 30-employee department was admittedly qualified but not considered for promotion to a higher level position filled by a man, and where the 29 men in the department were *all* either already at the higher level or slated to be there in the near future, whether summary judgment against the woman was justified under *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	4
CONCLUSION	19
APPENDIX A	1a
APPENDIX B	8a
APPENDIX C	24a

TABLE OF AUTHORITIES

CASES — Page

Clark County School District v. Breeden, 532 U.S. 268 (2001) 7, 19
Eastland v. Tennessee Valley Authority, 704 F.2d 613 (11th Cir.), *cert. denied*, 465 U.S. 1066 (1984) 6, 11, 12
Equal Employment Opportunity Commission v. Alton Packaging Corp., 901 F.2d 920 (11th Cir. 1990) 6, 12
Hetzel v. Prince William County, 523 U.S. 208 (1998) 18, 19
Hill v. Seaboard C.L.R. Co., 767 F.2d 771 (11th Cir. 1985) 6, 12
Joshi v. Florida State University Health Center, 763 F.2d 1227 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985) 6, 11
Lams v. General Waterworks Corp., 766 F.2d 386 (8th Cir. 1985) 6, 14
Lytle v. Household Manufacturing, Inc., 494 U.S. 545 (1990) 18
Mardell v. Harleysville Life Insurance Co., 31 F.3d 1221 (3d Cir. 1994), *vacated and remanded*, 514 U.S. 1034 (1995), *opinion reinstated in pertinent part*, 65 F.3d 1072, 1073 (3d Cir. 1995) 6, 13
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 8, 9, 14
McKennon v. Nashville Banner Pub. Co., 513 U.S. 352 (1995) 5, 6, 10
Nanty v. Burrows Co., 660 F.2d 1327 (9th Cir. 1981), *overruled on other grounds, O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 760-61 (9th Cir. 1996) 6, 13

TABLE OF AUTHORITIES—Continued

Page

O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996) 18
Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 17, 18
Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) ..... *passim*
Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) 6, 8, 9, 18
Robinson v. Shell Oil Co., 519 U.S. 337 (1997) 18
Sabree v. United Brotherhood of Carpenters and Joiners Local No. 33, 921 F.2d 396 (1st Cir. 1990) 6, 9, 12
St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) 8, 9
Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) ..... *passim*
United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983) 8
Wright v. Universal Maritime Service Corp., 525 U.S. 70 (1998) 18

STATUTES

42 U.S.C. §§ 2000e *et seq.* 2
42 U.S.C. § 2000e-2(a) 2, 7

IN THE

Supreme Court of the United States

No. ___

KARIN SKOLD VAN SLYKE,

Petitioner,

v.

NORTHROP GRUMMAN CORPORATION.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

Karin Skold Van Slyke petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The unpublished decision of the Court of Appeals appears at App. A, 1a-7a. The opinion of the district court, which is reported at 115 F.Supp.2d 587 (D. Md. 2000), appears at App. B, 8a-23a. The district court's order appears at App. C, 24a-25a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 27, 2001. Petitioner did not request rehearing. On November 21, 2001 the Chief Justice extended the time for filing this petition to December 26, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the application of Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. §§ 2000e *et seq.* Section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a), provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT

Petitioner Karin Van Slyke, an engineer, was the only woman among the 30 engineers in her department at respondent Northrop Grumman Corporation. She was also the only engineer in the department denied Code 36 program management status. Van Slyke filed this Title VII action after she was passed over for three Code 36 positions in 1997; and the district court granted summary judgment in Northrop's favor on the basis of a rationale that admittedly did not motivate company officials at the time the promotion decisions were made. The Court of Appeals affirmed based on the district court's reasoning.

Van Slyke began working for Northrop's predecessor in 1978. In December 1997, she filed a Title VII charge with the Equal Employment Opportunity Commission, contending that she had repeatedly been passed over for promotion to

program management jobs (Code 36) because of her sex. EEOC issued a notice of right to sue, and Van Slyke then filed this suit in August 1998. Following discovery, Northrop moved for summary judgment, and the district court granted that motion. App. B, 8a.

In its decision, the district court first rejected certain aspects of Van Slyke's claim as untimely; this petition does not challenge that ruling. The court then addressed three timely promotion denials and held that, as to them, Van Slyke had made a prima facie showing that she was not promoted to Code 36 because of her sex. App. B, 15a-19a. The burden then shifted to Northrop to articulate a "legitimate, nondiscriminatory reason" for Van Slyke's rejection, *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981), and the court believed that the company had satisfied this burden of articulation by asserting a "superior qualifications" defense, *i.e.*, that Van Slyke was less qualified than the three men who were promoted. App. B, 19a-21a.

Finally, the district court considered whether Van Slyke had "demonstrate[d] pretext," *Burdine*, 450 U.S. at 256, *i.e.*, whether she had "demonstrate[d] that the proffered reason was not the true reason for the employment decision." *Id.* Here the court said (erroneously) that Van Slyke had offered only two types of evidence of pretext—(1) statistics comparing the percentage of women employed by Northrop company-wide with the percentage of women managers, and (2) proof that she was better qualified than the promoted men. The court held that the statistical evidence was not probative, App. B, 21a-22a, and that Van Slyke had proved that she was "arguably *as qualified as*" the men but not that she was better qualified. *Id.*, 23a (emphasis in original). This, the court said, was not good enough, and it entered summary judgment for Northrop. *Id.*

On appeal, the Fourth Circuit first outlined the factual background of the case and then summarized the district

court's decision. App. A., 2a-6a. The recitation included certain undisputed facts relevant to pretext that had not been dealt with in the district court's opinion. For example, the appellate court said that Northrop admitted that Van Slyke's supervisors "knew [she] sought a Code 36 promotion." *Id.*, 2a. In addition, Northrop "concede[d] that Van Slyke could have held the specific positions given to [the three men] and that she was *not considered* for their specific positions." *Id.*, 4a (emphasis supplied). This occurred, moreover, in an environment in which Van Slyke was the only woman among the 30 engineers in her department, and in which "all of the department's 29 male engineers were either in Code 36 management positions or were slated to receive such positions by the end of 1998." *Id.*

In its summary of the district court's decision, the Fourth Circuit noted that the lower court had "rejected Van Slyke's argument that Northrop Grumman was not entitled to a 'superior qualifications' defense by failing to consider her for the [three men's] specific positions." App. A, 5a. The Court of Appeals did not discuss the merits of this or any other aspect of the district court's decision; rather, it simply affirmed, without analysis, "on the reasoning set forth in the district court's order." *Id.*, 7a.

REASONS FOR GRANTING THE PETITION

Introduction. The Fourth Circuit allowed Northrop Grumman to rely on—and prevail on—an explanation for challenged conduct that admittedly did not motivate Northrop at the time the decisions at issue were made. This approach is fundamentally at odds with the EEO jurisprudence of this Court and the decisions of five other Circuits.

Disparate treatment cases focus on motivation; the issue is whether the employer made a challenged decision for a prohibited reason. Given the primacy of motive, any defense

offered by the employer must purport to explain its motivation for acting as it did. That was not true of the defense that the Fourth Circuit sanctioned here.

Karin Van Slyke alleged that she was denied promotion to a Code 36 management level position because of her sex, and she pointed to positions filled by three men. Northrop "knew Van Slyke sought a Code 36 promotion." App. A, 2a. And the company "concede[d] that [she] could have held" the three jobs in question but that she "was not considered" for them. *Id.*, 4a.

In the district court, Northrop sought to justify its actions by asserting that the men were better qualified than Van Slyke. But "'proving that the same decision would have been justified . . . is not the same as proving that the same decision would have been made.'" *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 360 (1995), *quoting Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989). And here it was evident that Northrop was not animated by relative qualifications "at the time of the decision," *McKennon, id.*, *quoting Price Waterhouse, id.*, since the company did not consider Van Slyke at all.

In these circumstances, as Van Slyke argued below, Northrop did not sustain even the modest burden of articulation imposed by *Burdine*, 450 U.S. at 254, under which "the defendant must clearly set forth, through the introduction of admissible evidence, the *reasons* for the plaintiff's rejection" (emphasis supplied). The district court, however, "rejected [the] argument that Northrop Grumman was not entitled to a 'superior qualifications' defense" for the three jobs at issue. App. A, 5a. Indeed, the court held as a matter of law that Van Slyke could not overcome this defense, even though she could prove that she was as qualified as the three men selected. App. B, 23a. The district court entered summary judgment on this basis, and the Fourth Circuit affirmed, adopting the lower court's reasoning. App. A, 7a.

The Fourth Circuit's cursory affirmance directly conflicts with the teachings of this Court in *Burdine*, *Price Waterhouse* and *McKennon* concerning the necessity of assessing motivation as of the time a decision is made. No other appellate court has gone astray in this regard. Except for the Fourth Circuit here, every Court of Appeals to consider the issue has held that an EEO defendant may not successfully assert, in response to a prima facie case under *Burdine*, an explanation that did not motivate it at the time the challenged decision was made. These courts include the First Circuit,[1] the Third,[2] Eighth,[3] Ninth[4] and Eleventh.[5] The Court should grant this petition to correct the Fourth Circuit's misunderstanding.

In addition, even assuming that a "superior qualifications" defense was available to Northrop, the district court's entry of summary judgment ran afoul of this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). In *Reeves*, the Court ruled that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully

---

[1] *Sabree v. United Brotherhood of Carpenters and Joiners Local No. 33*, 921 F.2d 396 (1st Cir. 1990).

[2] *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221 (3d Cir. 1994), *vacated and remanded*, 514 U.S. 1034 (1995), *opinion reinstated in pertinent part*, 65 F.3d 1072, 1073 (3d Cir. 1995).

[3] *Lams v. General Waterworks Corp.*, 766 F.2d 386 (8th Cir. 1985).

[4] *Nanty v. Burrows Co.*, 660 F.2d 1327 (9th Cir. 1981), *overruled on other grounds, O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 760-61 (9th Cir. 1996).

[5] *Equal Employment Opportunity Commission v. Alton Packaging Corp.*, 901 F.2d 920 (11th Cir. 1990); *Hill v. Seaboard C.L.R. Co.*, 767 F.2d 771 (11th Cir. 1985); *Joshi v. Florida State University Health Center*, 763 F.2d 1227 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985); *Eastland v. Tennessee Valley Authority*, 704 F.2d 613 (11th Cir.) *cert. denied*, 465 U.S. 1066 (1984).

discriminated." *Id.* at 148. And when assessing the sufficiency of the employee's evidence on summary judgment, a court "must draw all reasonable inferences in favor of the [employee]" and "must disregard all evidence favorable to the [employer] that the jury is not required to believe." *Id.* at 150-51.

In the present case, a jury would not be "required to believe" Northrop's assertion that Van Slyke was rejected for three Code 36 positions based on her qualifications, where the company conceded that she could have held the jobs but was not considered for them—and where it was undisputed that Van Slyke was the only woman among the 30 engineers in her department, and that "all of the department's 29 male engineers were either in Code 36 management positions or were slated to receive such positions." App. A, 4a. This petition should also be granted to insure proper application of the principles in *Reeves* in the summary judgment setting.

Finally, given the plain error in the decision of the Court of Appeals, summary reversal would be appropriate. *See, e.g., Clark County School District v. Breeden*, 532 U.S. 268 (2001).

1. The primary issue in a disparate treatment case under Title VII is the motivation of the employer. The Fourth Circuit, however, permitted Northrop Grumman to respond to Karin Van Slyke's prima facie case by asserting a rationale that admittedly did not motivate company officials at the time the promotion decisions challenged by Van Slyke were made. This was error and ignored both the language of Title VII and this Court's decisions. No other Court of Appeals has made the same error.

a. Under § 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1), it is "an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's . . . sex" (or race, religion or national origin). It is evident that the statute does not

proscribe any particular employment practices; rather, it outlaws only that conduct that is *motivated* by an impermissible criterion:

> The "factual inquiry" in a Title VII case is "whether the defendant intentionally discriminated against the plaintiff." * * * In other words, is "the employer . . . treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'"

United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983) (citations omitted).

In light of this "factual inquiry," disparate treatment cases under Title VII focus on the motivation animating the challenged conduct, *e.g.*, a promotion denial. On rare occasions, there is direct evidence that the employer simply acted for a discriminatory reason, such as a written memo extolling a woman's qualifications but saying that female managers would be bad for business. These are easy cases—there is little question that the employer has violated § 703(a)(1)—and they usually settle.

b. In order "to compensate for the fact that direct evidence of intentional discrimination is hard to come by," *Price Waterhouse*, 490 U.S. at 271 (O'Connor, J., concurring in the judgment), this Court has fashioned an analytical framework for assessing indirect, circumstantial evidence of intent in Title VII and other EEO cases. First, the plaintiff employee must establish a prima facie case of discrimination; the defendant employer must then respond by articulating a lawful reason for the challenged conduct; and finally the plaintiff has the opportunity to prove that the articulated rationale is not the defendant's true reason but is instead a pretext for discrimination. *See generally McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Department of Community Affairs v. Burdine*, *supra*; *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

The Court has over the years refined the original *McDonnell Douglas* model. Thus *Burdine* clarified that the defendant's burden in responding to a prima facie case is one of production, not proof. 450 U.S. at 254 ("[t]he burden that shifts to the defendant . . . is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons"). And *Hicks* and *Reeves* explained that "the fact-finder's rejection of the employer's legitimate, nondiscriminatory reason for its action does not *compel* judgment for the plaintiff," but that "it is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Reeves*, 530 U.S. at 146-47 (emphasis in original).

The Court has not expressly considered whether an employer may respond to a prima facie case under *McDonnell Douglas* and *Burdine* by asserting a rationale that did not motivate it at the time the decision was made. Still, it "seem[s] evident that the term 'motivation' clearly contemplates defendant's mental state at the time of an action." *Sabree*, 921 F.2d at 403. In any event, as the First Circuit in *Sabree* also noted, *id.*, "the Supreme Court made this crystal clear in *Price Waterhouse v. Hopkins*," a mixed-motives case.

The Court in *Price Waterhouse* emphasized that motivation must be assessed as of the time that the decision under scrutiny was made:

> The present, active tense of the operative verbs of § 703(a)(1) . . . turns our attention to the actual moment of the event in question, the adverse employment decision. The critical inquiry, the one commanded by the words of § 703(a)(1), is whether gender was a factor in the employment decision *at the moment it was made*.

490 U.S. at 240-41 (emphasis in original). Thus,

> [i]n saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer *at the moment of the decision* what its reasons were and if we received a truthful response, one of those reasons would be that the . . . employee was a woman.

Id. at 250 (emphasis supplied). Finally, because Title VII deals with motivation, an employer may not defend only by showing that the challenged decision made sound business sense:

> [P]roving "'that the same decision would have been justified . . . is not the same as proving that the same decision would have been made.'" * * * An employer may not, in other words, prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it *at the time of the decision.*

Id. at 252 (citations omitted) (emphasis supplied).

The language quoted is from the plurality opinion in *Price Waterhouse*, but a unanimous Court adopted the same approach to assessment of motivation in *McKennon v. Nashville Banner Pub. Co., supra. McKennon* presented a permutation in the area of disparate treatment—the situation in which it is assumed (or conceded) that the reason for the challenged action was discriminatory when made, but in which the employer later discovered a lawful reason that would have justified the action. The Court held that such "after-acquired evidence" could limit relief but would not affect liability. This was because such evidence, by definition, had no bearing on the employer's motivation at the time the decision was made:

> McKennon's misconduct was not discovered until after she had been fired. The employer could not have been motivated by knowledge it did not have and it cannot now claim that the employee was fired for the nondiscriminatory reason. Mixed motive cases are inapposite here, except to the important extent they

> underscore *the necessity of determining the employer's motives* in ordering the discharge, an essential element in determining whether the employer violated the federal antidiscrimination law. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989) (plurality opinion) (employer's legitimate reason for discharge in mixed-motive case will not suffice "if that reason did not motivate it *at the time of the decision*"); *id.*, at 260-261 (White, J., concurring in judgment); *id.*, at 261 (O'Connor, J., concurring in judgment). As has been observed, "proving that the same decision would have been justified . . . is not the same as proving that the same decision would have been made." *Id.*, at 252 (plurality opinion) . . . *see also id.*, at 260-261 (White, J., concurring in judgment).

513 U.S. at 359-60 (parallel citations omitted) (emphasis supplied).

c. Other Courts of Appeals have recognized that an employer may not successfully defend under *Burdine* by asserting an explanation that did not motivate it at the time the challenged decision was made. In *Joshi v. Florida State University Health Center*, *supra*, the Eleventh Circuit considered a situation in which the defendant had "attempted to rebut [plaintiff's] prima facie case by showing that the males hired or offered the position were at least as qualified as she." 763 F.2d at 1235. The court held that "[t]his articulated reason is insufficient as a matter of law. * * * Because [plaintiff] was not considered, her qualifications were not compared to those of the male applicants and hence, the relative qualifications of those applicants cannot be a reason for the defendants' failure to hire her." *Id.* *Joshi* was remarkably similar to the present case,[6] as was *Eastland v.*

---

[6] Despite the district court's attempt to distinguish it, *Joshi* is virtually identical factually to Van Slyke's situation. The relevant decision-makers were generally aware of Dr. Joshi's qualifications, because she had earlier applied for other positions. But the "district court found that 'the plaintiff

Tennessee Valley Authority, *supra*, 704 F.2d at 626 ("TVA's decision cannot be defended on the basis of the relative qualifications of the applicants if these qualifications were not considered").

Other Eleventh Circuit decisions have applied the same principle, *e.g.*, *Hill v. Seaboard C.L.R. Co.*, *supra*, 767 F.2d at 774 ("[o]f course, failure to promote a plaintiff because the person actually promoted was more qualified is a nondiscriminatory reason, but the articulation of that reason must include the fact that the decision-maker knew that the promoted individual's qualifications were superior at the time the decision was made"); *Equal Employment Opportunity Commission v. Alton Packaging Corp.*, *supra*, 901 F.2d at 925 (same).

The First Circuit is equally emphatic. In *Sabree*, 921 F.2d at 404, the court first cited *Price Waterhouse*, then held:

> Although *Price Waterhouse* is a mixed motive, direct evidence case and Sabree's case is a circumstantial evidence case governed by *McDonnell Douglas*, *Price Waterhouse's* directive to essentially take a snapshot at the moment of the allegedly discriminatory act is applicable to all Title VII cases.
>
> * * *
>
> Unless . . . a defendant articulates a "legitimate nondiscriminatory reason" that *actually* motivated the decision, the reason is legally insufficient.

(Emphasis in original.) The court noted that, "[i]n cases using the *McDonnell Douglas* framework, the defendant bears only a production burden, not a burden of persuasion as

---

was not actively considered for hiring' during [the] period" when the job at issue was filled. 763 F.2d at 1235. And "because Joshi's qualifications were not considered, [defendant] cannot rely on its contention that other candidates were better qualified to explain its decision not to hire her." *Id.*

in *Price Waterhouse*, direct evidence, cases. Although the burden is lighter, the inquiry remains the same—the defendant's actual motivation." *Id.*, n.16.

The Third Circuit signaled its concurrence in *Mardell v. Harleysville Life Ins. Co.*, *supra*, 31 F.3d at 1229, an after-acquired evidence case that predated this Court's decision in *McKennon* ("under the mixed-motives analysis, the employer in an after-acquired evidence case cannot contend that it would have reached the same decision at the time it was made absent the illicit motive. Concomitantly, *under the pretext analysis*, it should be simple for the employee to demonstrate beyond peradventure that the proffered legitimate (but after-acquired) reason was not the true cause for the decision but is merely a 'pretext' ") (emphasis supplied).

In an early post-*Burdine* decision, *Nanty v. Burrows Co.*, *supra*, the Ninth Circuit considered a situation in which a Native American had been summarily rejected for a truck driving job in Arizona. The employer sought to argue that the applicant would not have been qualified, but the court rejected that contention, since the decision to reject Nanty was not motivated by any concern about qualifications:

> We now turn to step two of the *McDonnell Douglas* analytic process, and consider the question whether Barrows "articulate(d) a legitimate nondiscriminatory" reason for Nanty's rejection. At step two of the *McDonnell Douglas* analysis, the defendant must show, "through the introduction of admissible evidence, the reasons for the plaintiff's rejection." *Burdine*, 450 U.S. at 255 (emphasis added) (footnote omitted). Barrows makes several arguments explaining why Nanty would not have been hired as a furniture delivery truck driver. However, these arguments are simply not relevant here, since none explains the reason for Nanty's rejection. Barrows knew nothing about Nanty at the time of the rejection and offers no explanation for its action in rejecting Nanty. Thus Barrows has totally failed to

> "articulate a legitimate nondiscriminatory" reason for Nanty's rejection and to meet its step two burden.
>
> * * * Since Barrows offered no explanation for its decision to reject Nanty, it remained "silent in the face of the presumption" created by Nanty's prima facie case. *Burdine*, 450 U.S. at 254. Thus, Nanty's prima facie showing is sufficient to meet his ultimate burden of proving unlawful discrimination under *McDonnell Douglas*.

660 F.2d at 1332 (parallel citations and footnote omitted).

The Eighth Circuit cited *Nanty* and followed the same path in *Lams v. General Waterworks Corp.*, *supra*. In *Lams*, as in the present case, the plaintiffs "never were actually considered for the positions in dispute, and thus were not compared with the successful candidates." 766 F.2d at 391. And given the lack of actual comparisons at the time the selections were made, the employer could not assert comparative qualifications as a defense:

> The Waterworks' *post hoc* comparisons between the employees who were promoted and plaintiffs fail to explain why plaintiffs were not interviewed or considered for the positions, especially in light of the Waterworks' concession that both plaintiffs were qualified for the positions sought.

Id. at 393. In similar fashion, Northrop Grumman here conceded that Karin Van Slyke "could have held" the three jobs at issue but "was not considered" for them. App. A, 4a.

In sum, the decisions of the Courts of Appeals apart from the Fourth Circuit are uniform and accord with this Court's precedent: in an EEO case subject to the *McDonnell Douglas/ Burdine* framework, a defendant may *not* respond to the plaintiff's prima facie case by articulating a rationale that did not motivate it at the time of the challenged action. Only the Fourth Circuit in the present case has sanctioned a deviation from this principle.

d. There is no question that the Fourth Circuit condoned Northrop Grumman's reliance on a rationale—the "superior qualifications" of the men chosen for the three jobs at issue—that did not motivate the company's officials at the time the promotion decisions were made. Indeed, as the court said, Northrop "concede[d] that Van Slyke could have held the specific positions given to [the three men] and that she was *not considered* for their specific positions." App. A, 4a (emphasis supplied). And if Van Slyke was not considered, it follows that Northrop did not reject her based on her credentials. Whatever else may have been in the decision-maker's mind at the time, it was not an assessment of relative qualifications.

Van Slyke argued below that Northrop could not rely on a "superior qualifications" defense. First, there was no foundation for this defense on the merits, given the concession that Van Slyke was not considered for the jobs at issue. Second, not a single Northrop official said that Van Slyke was rejected for the promotions in question because she was less qualified than the men chosen, and the company has never cited any such statement. There was no deposition testimony to this effect; nor did Northrop submit any affidavits from the pertinent officials. Rather, the "superior qualifications" defense was an argument of counsel that appeared for the first time in Northrop's summary judgment brief, and that is not sufficient under *Burdine*. *See* 450 U.S. at 254 n.9 ("[a]n articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden merely . . . by argument of counsel").

In any event, the Fourth Circuit noted that the district court had "rejected Van Slyke's argument that Northrop Grumman was not entitled to a 'superior qualifications' defense by failing to consider her for the [three men's] specific positions." App. A, 5a. The Court of Appeals did not discuss the merits of the district court's reasoning but simply added that

the court "had distinguished the line of cases Van Slyke relied upon . . . and explained that Northrop Grumman was aware of Van Slyke's qualifications and 'repeatedly met with her to discuss positions in accord with her qualifications and skills.'" *Id.* This is a *non sequitur*. Northrop's general awareness of Van Slyke's qualifications, and meetings that may have occurred concerning *other* jobs, do not erase the concession that she was not considered for the positions filled by the three men. For these jobs—the ones at issue in this case—Northrop did not compare her qualifications with those of the men, because the company did not consider her at all.

Nor was this a situation in which a woman was not considered because an employer, generally aware of her qualifications, felt that she was not up to the job. On the contrary, as the Court of Appeals observed, Northrop "concede[d] that Van Slyke could have held the specific positions" given to the men. App. A, 4a. And the district court said that the record would support a finding that Van Slyke was as qualified as the men. App. B, 23a.

Northrop Grumman failed to consider Karin Van Slyke for the three positions that she sued about. Given that failure, the company could not defend its decision to select three men by asserting that they were better qualified than she. Northrop did not meet its burden of articulation under *Burdine*.

2. Even assuming that a "superior qualifications" defense was available to Northrop, the district court erred in granting summary judgment, and the Court of Appeals necessarily erred in affirming based solely on the district court's reasoning. The district court ruled that Van Slyke had shown that she was "arguably *as qualified as* the three men promoted," but not that she was "*more* qualified—the burden which plaintiff must satisfy at the pretext stage." App. B, 23a (emphasis in original). Putting to one side the propriety of this type of nuanced determination about qualifications on summary judgment, it is just wrong to suggest that an EEO

plaintiff can prove pretext only by showing that she was better qualified than the man chosen. On the contrary, this Court has held that plaintiffs must be afforded broad latitude in demonstrating the pretextual nature of the employer's defense:

> Although petitioner retains the ultimate burden of persuasion, our cases make clear that she must also have the opportunity to demonstrate that respondent's proffered reasons for its decision were not its true reasons. * * * In doing so, petitioner is not limited to presenting evidence of a certain type. * * * The evidence which petitioner can present in an attempt to establish that respondent's stated reasons are pretextual may take a variety of forms. * * * Indeed, she might seek to demonstrate that respondent's claim to have promoted a better qualified applicant was pretextual by showing that she was in fact better qualified than the person chosen for the position. The District Court erred, however, in instructing the jury that in order to succeed petitioner was *required* to make such a showing.

Patterson v. McLean Credit Union, 491 U.S. 164, 187-88 (1989) (citations omitted) (emphasis in original).

The district court (and hence the Court of Appeals in affirming) sought to distinguish *Patterson* by saying that Van Slyke had failed to prove her "sole alternative means of demonstrating pretext," *i.e.*, the use of company-wide statistics on women in management. App. B, 22a n.8. In fact, though, as the Fourth Circuit noted, Van Slyke offered other evidence of pretext, beyond that mentioned by the district court. For example, she was the only woman among the 30 engineers in her department; she could not get a Code 36 job; and "all of the department's 29 male engineers were either in Code 36 management positions or were slated to receive such positions." App. A, 4a. In addition, Northrop conceded that Van Slyke was not considered for the jobs at issue, even though she "could have held" them. *Id.*

When assessing the sufficiency of an employee's evidence of pretext on summary judgment, a court "must draw all reasonable inferences in favor of the [employee]" and "must disregard all evidence favorable to the [employer] that the jury is not required to believe." *Reeves*, 530 U.S. at 150-51. In the present case, the jury was hardly "required to believe" that the company's action in passing over Van Slyke had anything to do with her credentials. After all, Northrop did not even consider her, and all 29 men in her department got more favorable treatment.

The award of summary judgment based on relative qualifications was flatly contrary to *Patterson* and *Reeves*. But Northrop should not have been permitted to assert a "superior qualifications" defense in the first place.

3. The decision of the Fourth Circuit in this case is unpublished, but it is emblematic of that court's sometimes parsimonious approach to cases arising under Federal anti-discrimination legislation. *See, e.g., Hetzel v. Prince William County*, 523 U.S. 208 (1998) (unanimously and summarily reversing unpublished decision of Fourth Circuit in TitleVII/ § 1983 case); *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997) (unanimously reversing decision of Fourth Circuit in Title VII case); *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990) (unanimously vacating and remanding unpublished decision of Fourth Circuit in Title VII/§ 1981 case); *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996) (unanimously reversing and remanding decision of Fourth Circuit in Age Discrimination in Employment Act case); *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998) (unanimously vacating and remanding unpublished decision of Fourth Circuit in Americans with Disabilities Act case).

Review by this Court is necessary in the present case to insure that there is proper application of the Court's

precedent. Given the nature of the case, summary reversal would be appropriate. See *Hetzel v. Prince William County, supra*; *Clark County School District v. Breeden, supra.*

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted,

DOUGLAS B. HURON *
PHILIP J. SIMON
HELLER, HURON, CHERTKOF
LERNER, SIMON & SALZMAN
1730 M Street, N.W.
Suite 412
Washington, DC 20036
(202) 293-8090

* Counsel of Record

Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 00-2349

KARIN SKOLD VAN SLYKE,
Plaintiff-Appellant,

v.

NORTHROP GRUMMAN CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
William M. Nickerson, District Judge.
(CA-98-2791)

Argued: May 10, 2001
Decided: August 27, 2001

OPINION

Before NIEMEYER and GREGORY, *Circuit Judges*, and Arthur L. ALARCON, *Senior Circuit Judge* of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

PER CURIAM:

Karin Skold Van Slyke ("Van Slyke") appeals the district court's order granting summary judgment to Northrop Grumman Corporation ("Northrup Grumman") on her claims of gender-based employment discrimination. Finding no error, we affirm.

I.

Van Slyke worked as an engineer for Northrop Grumman and its predecessor, Westinghouse Electric Corporation, from 1978 until 2000. Throughout her employment, Van Slyke progressed from a salary Code 27 (or Code 07, as it was termed when Van Slyke started at Westinghouse) to a salary Code 35, resulting in a pay increase from $16,000 to $73,400. Van Slyke, though, never attained the highest Code level available to engineers, Code 36, which denoted a management level position.

Northrop Grumman did not have a fixed number of managerial positions, but instead promoted engineers to Code 36 depending on the particular job duties assigned to the employee, the employee's level of responsibility, and the employee's proven management contribution. Northrop Grumman admits that its promotion scheme was unconventional and that movement between codes was not predicated on a traditional, competitive promotion system. Instead, it was determined by the nature of the work performed and the degree of responsibility given. A promotion to Code 36 also was predicated on an employee's department manager's recommendation.

From 1995 until Spring 1998, Van Slyke worked in Northrop Grumman's Electronic Sensors and Systems Sector ("ESSS"), which was responsible for the development and production of sophisticated electronic systems for the national defense and civil aviation. Specifically, Van Slyke worked in the Advanced Radar and Avionics Department ("ARAD") of the Systems Development and Technology Division ("SD&T"). Her direct supervisors there were Richard Davis and Kevin Leahy. Northrop Grumman admits that Davis and Leahy knew Van Slyke sought a Code 36 promotion. Additionally, it is undisputed that Van Slyke often took the initiative in her attempts to attain such a promotion, seeking

Davis and Leahy's advice regarding promotions and unilaterally making decisions she thought would help her obtain a promotion.

In 1997 and 1998, Davis worked with Van Slyke to set performance objectives and assign responsibilities on particular programs that could be expected to eventually provide Van Slyke with management opportunities. Van Slyke, though, did not follow up on some opportunities offered to her. For example, in 1996, Davis and Van Slyke agreed that she should work on the CryoRadar Program because it could provide her with the opportunity for eventual advancement to Code 36. Within a few months of accepting the assignment, though, Van Slyke asked Davis to decrease her workload and allow her to take a supporting role on another program, which did not involve a management role. When Van Slyke completed work on the other project, she returned to CryoRadar, but provided only "cost proposal support."

Similarly, in February 1998, Van Slyke and Leahy agreed that he would work with her to find job opportunities warranting a Code 36 promotion. They jointly determined that such an opportunity could be available in managing the cost proposal for the Radar Technology Insertion Program ("RTIP"). Leahy testified that he believed Van Slyke would have received a Code 36 promotion had she remained with RTIP and Northrop Grumman been awarded the contract for the project. Van Slyke testified that her RTIP supervisor, Joel Brown, promised her a promotion if Northrop Grumman landed the contract.

Van Slyke, though, asked Leahy to reassign her RTIP responsibilities to someone else after only two months, stating that she would be "pleased to take on the more appropriate role of supporting" a program manager.

Van Slyke alleges that Leahy and Davis repeatedly passed her over for Code 36 promotions. She claims that three less-

experienced men, R. Tranchini, E. Capelle and P. Reid,* received Code 36 promotions in 1997-98 and that Northrop Grumman never considered her for the management positions they received. Leahy concedes that Van Slyke could have held the specific positions given to Tranchini, Capelle and Reid and that she was not considered for their specific positions.

Throughout her tenure at Northrop Grumman, Van Slyke generally received favorable performance reviews. However, a few supervisors noted that she gravitated to supporting roles and lacked leadership abilities. Additionally, Van Slyke consistently ranked near the bottom of members in her department in terms of relative contribution to the organization.

According to Van Slyke, she was the only female engineer in ARAD. When she transferred out of ARAD in 1998, all of the department's 29 male engineers were either in Code 36 management positions or were slated to receive such positions by the end of 1998. Additionally, Van Slyke contends that women headed only one of 26 departments within SD&T and that, while women comprised 7.8% of the more than 1600 managers in ESSS, they comprised only 4.9% of managers in SD&T.

In December 1997, Van Slyke filed a Title VII charge with the EEOC, contending that Northrop Grumman failed to promote her because of gender discrimination. The EEOC issued a notice of right to sue in July 1998 and Van Slyke filed suit in August 1998. Northrop Grumman moved for

---

* On appeal and in the court below, Van Slyke extended this list of comparators to include two additional men promoted in the same time period. The district court refused to consider claims relating to these additional men, thereby restricting Van Slyke to the three men she mentioned in her complaint and in her interrogatory responses. *Van Slyke v. Northrop Grumman*, 115 F. Supp.2d 587, 592 n. 4 (D. Md. 2000).

summary judgment after the close of discovery, which the district court granted on September 18, 2000. *Van Slyke v. Northrop Grumman*, 115 F. Supp.2d 587 (D. Md. 2000).

In granting summary judgment, the district court first limited Van Slyke's claims to actions occurring after February 1997, i.e. 300 days before she filed an EEOC charge. *Id.* at 593. *See also Beall v. Abbott Laboratories*, 130 F.3d 614, 620-21 (4th Cir. 1997). The district court rejected Van Slyke's "continuing violation" argument, which was based on her contention that Northrop Grumman's promotion structure was "secretive." *Id.* The district court agreed that the promotion process was informal, but explained that the record was devoid of any evidence suggesting that it was secretive. Moreover, the district court noted that, even if the promotion structure was"secretive," Van Slyke acknowledged familiarity with the program. Finally, the district court held that the allegedly discriminatory acts that Van Slyke relies upon, which occurred more than 300 days before she filed with the EEOC, should have put her on earlier notice of possible discrimination. *Id.* at 594.

Next, the district court ruled that Van Slyke established a *prima facie* case of discrimination, *id.* at 594-96, and that Northrop Grumman adequately asserted a legitimate, non-discriminatory reason for failing to promote Van Slyke—that the comparators she identified were more qualified for their positions than Van Slyke. *Id.* at 596-97. The district court rejected Van Slyke's argument that Northrop Grumman was not entitled to a "superior qualifications" defense by failing to consider her for the comparators' specific positions. *Id.* at 596-97. The district court distinguished the line of cases Van Slyke relied upon for this proposition and explained that Northrop Grumman was aware of Van Slyke's qualifications and "repeatedly met with her to discuss positions in accord with her qualifications and skills." *Id.*

Finally, the court held that Van Slyke failed to establish that Northrop Grumman's proffered legitimate, non-discriminatory reason was pretextual. *Id.* at 597-98. The district court rejected Van Slyke's statistical defense, explaining that "statistical evidence has little, if any, relevance in an individual disparate treatment action." *Id.* at 597.

Additionally, the district court rejected Van Slyke's assertion that she was better qualified than her comparators, explaining that "[t]he mere assertion [by the plaintiff] that [the plaintiff] was more qualified is insufficient to establish pretext." *Id.* at 598 (quoting *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 763 (4th Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999)).

III.

This Court reviews a grant of summary judgment *de novo*. *Higgins v. E. I. DuPont de Nemours & Co.*, 863 F.2d 1162, 1167 (4th Cir. 1988). Summary judgment is appropriate only if there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A material fact is in dispute when its existence or non-existence could lead a jury to different outcomes. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue exists when there is sufficient evidence on which a reasonable jury could return a verdict in favor of the non-moving party. *Id.* Mere speculation by the non-moving party cannot create a genuine issue of material fact. *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985). The Court must view the evidence in the light most favorable to the non-moving party. *Smith v. Virginia Commonwealth Univ.*, 84 F.3d 672, 675 (4th Cir. 1996) (en banc).

We have reviewed the record, briefs, and pertinent case law on this matter de novo, and have had the benefit of oral

argument. Our careful review persuades us that the district court's ruling was correct. Accordingly, we affirm the grant of summary judgment to Northrop Grumman on the reasoning set forth in the district court's order. *See Van Slyke v. Northrop Grumman*, 115 F. Supp.2d 587 (D. Md. 2000).

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action WMN-98-2791

KARIN SKOLD VAN SLYKE,

v.

NORTHROP GRUMMAN CORPORATION.

MEMORANDUM

Before the Court is Defendant's Motion for Summary Judgment (Paper No. 84).[1] The motion is ripe for decision. Upon a review of the motion and the applicable case law, the Court determines that no hearing is necessary (Local Rule 105.6) and that Defendant's motion will be granted.

I. BACKGROUND

This Title VII action arises out of Plaintiff's employment as an engineer at Northrop Grumman Corporation (Northrop). Plaintiff has been employed at Northrop, or its predecessor,

---

[1] Also before the Court is Plaintiff's Motion to Strike Improper Materials (Paper No. 88) and Defendant's Motion to Strike Declarations of Karin and Eric Van Slyke (Paper No. 91). Defendant's Motion will be denied as moot. Plaintiff acknowledges that parts of her and her husbands declarations are inadmissible. See Pl's.ns that are admissible, the Court finds that Plaintiff is unable to sustain her discrimination claim.

As for Plaintiff's Motion, it will also be denied as moot, as the Court finds that it need not make reference to the disputed materials in deciding the sufficiency of Plaintiff's discrimination claim.

Westinghouse Electric Corporation, since 1978.[2] Plaintiff claims that she was discriminated against on the basis of her gender in that she was denied promotional opportunities provided to male employees. Plaintiff is employed at Defendant's BWI facility in its electronic systems business unit, known as the Electronic Sensors and Systems Sector (ESSS). ESSS is responsible for the development and production of sophisticated electronic systems for the nation's defense and civil aviation, in addition to other domestic and international applications. From 1990 through May 1998, Plaintiff worked in the Advanced Radar and Avionics Department (ARAD) of ESSS's Systems Development and Technology subdivision (SD&T). Under Defendant's present code salary system, Plaintiff's salary has increased from a Code 27 to a Code 35 (approximately 250%, from $16,000 to $73,500) during her years of employment.

Plaintiff alleges, however, that she was repeatedly passed over in consideration for promotions to Defendant's program management code [3] (Code 36 or higher), even though she expressly made known her desire for such advancement and demonstrated her managerial qualifications by aiding others in managing various programs. Plaintiff specifically contends that in September 1997, three less experienced men, Reid,

---

[2] It appears from the parties' pleadings, that Plaintiff remains employed with Defendant.

[3] As discussed below, Defendant admits that its promotion scheme is unconventional, as "movement between codes is not predicated on a traditional, competitive promotion system" but rather is determined by "the nature of the work performed and the associated degree of responsibility." Mot. at 6-7. Plaintiff's department manager, Richard Davis, testified that the method used for promotions was for a manager to identify the potential candidate for promotion based on the scope and responsibilities of work the individual was currently doing and to identify if the current work scope and responsibility was above their current code." There was no formal application process for promotion. *Id.* at 7.

Capelle and Trachini, were promoted in preference to her.[4] Defendant counters that Plaintiff was not promoted because she repeatedly avoided work in managerial positions on programs which would have enabled her to be considered for promotion to management code. Defendant further argues that the employees promoted were better qualified for the positions. Plaintiff contends that the positions that she was offered were deadends with no promotion potential and that she, in fact, was better qualified for promotion.

II. ANALYSIS

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to summary judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). For purposes of summary judgment, a dispute about a fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party," and a fact is material if, when applied to the substantive law, it affects the outcome of litigation. *Anderson*, 477 U.S. at 248.

---

[4] Plaintiff, in her Opposition, expands this list to include two other men promoted in the same time period. Plaintiff's Opp. at 2. Plaintiff is restricted in argument to the three men to which she first alluded in her complaint and later specifically identified in answer to an interrogatory. Complaint at ¶ 6; Pl's Interrog. Resp. No. 5; *See Diamond v. T. Rowe Price Assocs, Inc.*, 852 F.Supp. 372, 406 n.165 (D. Md. 1994) (court found Plaintiff's attempt in her opposition to defendant's motion for summary judgment to enlarge an earlier list of comparators was untimely and prejudicial to defendant, as defendant had relied on the earlier list as its basis for discovery into and analysis of plaintiff's promotion claim). Here, allowing Plaintiff to now expand her list of comparators would be prejudicial to Defendant, as Defendant relied on Plaintiff's interrogatory answer identifying three, not five, comparators as the basis for its discovery.

A party seeking summary judgment bears the initial responsibility of informing the court of the basis of its motion and identifying the portions of the opposing party's case which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). When considering the motion, the court assumes that all of the non-moving party's evidence is worthy of belief and justifiable inferences are drawn in favor of the non-moving party. *Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If the movant demonstrates that there is no genuine issue of material fact and that she is entitled to summary judgment as a matter of law, the non-moving party must, in order to withstand the motion for summary judgment, produce sufficient evidence in the form of depositions, affidavits or other documentation which demonstrates that a triable issue of fact exists for trial. *Celotex*, 477 U.S. at 324. The existence of only a "scintilla of evidence" is not enough to defeat a motion for summary judgment. Instead, the evidentiary materials must show facts from which the finder of fact could reasonably find for the non-moving party. *Anderson*, 477 U.S. at 252. At the summary judgment phase, it is not appropriate for the court to make credibility determinations, weigh the evidence, or draw inferences from the facts which are adverse to the nonmoving party; these are jury functions. *Anderson*, 477 U.S. at 255.

A. Scope of Plaintiff's Claim

The two jurisdictional prerequisites to a Title VII action are (1) filing timely charges of employment discrimination with the EEOC; and (2) receiving and acting upon the EEOC's notice of the right to sue. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973). In Maryland, a charging party must file an EEOC charge within 300 days of the alleged unlawful employment practice. 42 U.S.C. § 2000e-5(e)(1). If a charging party fails to comply with this statutorily mandated filing period, alleged discriminatory acts

which occurred more than 300 days prior to the filing of the EEOC charge may not be subsequently challenged in a Title VII suit. *Beall v. Abbott Laboratories*, 130 F.3d 614, 620-21 (4th Cir. 1997).

Following the above reasoning, Defendant argues that conduct that is alleged to have occurred prior to February 1997 (300 days prior to Plaintiff's filing her charge of sex discrimination with the EEOC) cannot be part of the basis for her claim.[5] Plaintiff counters that "Defendant's constant and continuing failure to promote" Plaintiff constitutes a "continuing violation" under Title VII, thus enabling her to circumvent the 300 day requirement. Opp. at 23-25. An exception to the 2000e-5(e)(1) timely filing requirement is recognized where there are continuing violations. A continuing violation may consist of either a series of related acts, *Beall*, 130 F.3d at 620-21, or the maintenance of a discriminatory policy or system. *See* Lindemann, B. & Grossman, P., *Employment Discrimination Law* 1361 (3d. ed. 1996). The theory is available only if an actual violation has occurred within the required limitations period. *Beall*, 130 F.3d at 620-21.

A useful analysis borrowed from the Fifth Circuit, which is consistent with Fourth Circuit precedent, is found in *Berry v. Board of Supervisors*, 715 F.2d 971, 981 (5th Cir. 1983). There, the Fifth Circuit recommended a non-exhaustive list of three factors to consider in determining the existence of a continuing violation. First, do the alleged acts involve the same type of discrimination? *Berry*, 715 F.2d at 981; *Khan v. Jenkins*, 1987 WL 36862 at *3 (4th Cir. 1987) ("a continuing violation can be shown only by allegations detailing the same type of discriminatory action or violation"), *cert. denied*, 484 U.S. 1061 (1988). Second, are the incidents recurring or are

---

[5] It appears from the record that Plaintiff claims knowledge of acts of sex discrimination occurring as early as 1978. *See* Compl. ¶ 4; Pl's Dep. at 21-192; Pl's Interrog. Resp. No. 3.

they independent and isolated events? *Berry*, 715 F.2d at 981. Finally, did the earlier acts have sufficient permanency to trigger the employee's awareness of and duty to challenge the alleged violation? *Id.*; Lindemann & Grossman at 1362 ("courts frequently reject continuing violation claims when the plaintiff understood the earlier action(s) were not to be temporary or tentative—particularly when the plaintiff was aware of, or at least suspected discrimination at the time the earlier action(s) were taken"); *Talbot v. Mobil Corp.*, 46 F.Supp.2d 468, 472 (E.D. Va. 1999).

The continuing violation theory (a type of equitable tolling) applies where the "plaintiff proves 'that it would have been impossible for a reasonably prudent person to learn that [an employment action] was discriminatory.'" *Olson v. Mobil Oil Corp.*, 904 F.2d 198, 200 (4th Cir. 1990) (*quoting Miller v. Int'l Tel. and Tel. Corp.*, 755 F.2d 20, 24 (2d Cir. 1985)). Such impossibility exists only where the plaintiff is unaware of the facts giving rise to the claim because the defendant has intentionally concealed them. *Id.* at 201. Defendant correctly argues that Plaintiff cannot sustain a claim of "continuing violation" in the present case. Plaintiff argues that Defendant's secretive promotion structure made it impossible for her to apply or be considered for promotions. Opp. at 25. There is no evidence in the record, however, that the process was secretive, though, as Defendant readily admits, the process is very informal. Plaintiff's own description of the process implies that the process is more informal than it is secretive. *See id.* at 27 (citing Defendant's explanation of non-traditional, noncompetitive system) and 28 (promotion opportunities were not required to be posted; no competition for promotions sought). Furthermore, Plaintiff fails to meet her burden of showing that she was unaware of this informal structure—a requirement for the application of the continuing violation exception. In fact, Plaintiff admits that she repeatedly made use of the promotion structure, "aggressively pursuing program management opportunities" and repeatedly

telling her department managers that she desired a management position. Opp. at 29. Such an admission indicates that Plaintiff was aware of the structure through which she must pass to obtain the promotion she desired.

In addition, following the *Olson* test, the Court finds that it was possible for a "reasonably prudent person" to learn that the alleged failure to promote was possibly discriminatory. Looking solely to her answer to Defendant's interrogatory, Plaintiff cites numerous and frequent alleged discriminatory acts evidencing Defendant's failure to promote Plaintiff, while promoting men whom Plaintiff aided in management duties. *See* Pl's Resp. Interrog. No. 3 ("March 1991-September 1992: Required to perform code 36 responsibilities without promotion whereas male members with similar responsibilities were code 36 or higher; December 1993-July 1994: Denied deputy program manager positions, given to male manager from outside department; July 1994-April 1996: Authority undermined as manager of a program and Plaintiff was replaced by a male manager who was given her office). Looking at the nature, frequency, and number of the alleged acts that Plaintiff states she considered to be discriminatory, the Court finds that a reasonably prudent person would have, at a point prior to December 1997 (the time of Plaintiff's EEOC complaint), questioned the existence of a discriminatory promotion process.

As Plaintiff cannot satisfy her burden of establishing the existence of a continuing violation, the Court's analysis will be restricted to Plaintiff's claim that Defendant failed to promote her in favor of three less experienced men and to her related claims of discrimination occurring within the 300 day period prior to filing her EEOC charge.

B. Proof Scheme for Discrimination Claim

In order to show intentional discrimination, the plaintiff can present either direct or indirect evidence. *Halperin v.*

Abacus Tech. Corp., 128 F.3d 191, 196 (4th Cir. 1997). The necessary proof to indirectly establish a claim of disparate treatment (such as the failure to promote) is encompassed within a three-part framework: (1) the plaintiff must establish a prima facie case of discrimination by a preponderance of the evidence, *id.*; (2) the burden then shifts to the defendant who must articulate a legitimate, nondiscriminatory reason for the adverse employment action, *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981); and (3) the burden shifts back to the plaintiff to demonstrate that the reason offered by the employer is false, *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 2106 (2000).[6] The Court finds, as explained below, that Plaintiff fails to adequately support her claim of discrimination, as she is unable to demonstrate that Defendant's reason for its failure to promote her is pretextual.

1. The Prima Facie Case

In order to establish a prima facie case of failure to promote, Plaintiff must show by a preponderance of the evidence that "(1) she is a member of a protected class; (2) there was an open position for which she applied or sought to apply; (3) she was qualified for the position; and (4) she was rejected for the position under circumstances giving rise to an inference of unlawful discrimination." *Evans v. Technologies Applications and Svc. Co.*, 80 F.3d 954, 958 (4th Cir. 1996). Plaintiff is clearly a member of a protected class. Defendant argues that Plaintiff cannot establish that she applied for a specific program management position, and thus fails to establish a prima facie case of discrimination. *See* Mot. at 20.

---

[6] As Plaintiff correctly anticipated, the recent Supreme Court decision in *Reeves* overturned the Fourth Circuit's "pretext-plus" requirement, put forth in *Vaughn v. MetraHealth Cos., Inc.*, which made it necessary for the plaintiff to demonstrate not only that the employer's proffered nondiscriminatory reason is false, but that the employer's actions were motivated by discriminatory intent. 145 F.3d 197, 202 (4th Cir. 1998).

Plaintiff is correct in her assertion, however, that where an employer maintains an informal promotion selection process in which promotion positions are not posted or announced, formal applications are not accepted, and department managers select an employee for promotion based on their skills, qualifications and current job responsibilities, it is unnecessary for Plaintiff to demonstrate that she applied for a specific promotion position in order to meet the second prong of her prima facie case. *See Elguindy v. Commonwealth Edison Co.*, 903 F.Supp. 1260, 1267 (N.D. Ill. 1995).

In *Elguindy*, employees were not told when particular supervisory positions became available, or that they were being considered for such positions. Under those circumstance, the District Court for the Northern District of Illinois found that, although the plaintiff was unable to point to specific promotion positions in which she expressed an interest, the plaintiff, in order to satisfy the second prong of her prima facie case, was only required to show that had she known of a particular position, she would have applied. *Id.* The court further found that the plaintiff had satisfied that burden, as the evidence indicated that she repeatedly expressed her desire for promotion to her supervisors and requested that she be enrolled in courses teaching managerial and supervisory skills. The court found that "it is reasonable to infer that the plaintiff would have applied for (and accepted) a supervisory position had she been made aware of one." *Id.*

The facts of *Elguindy* parallel those of the present case. As previously noted, Defendant itself admits that it has a very informal promotion structure in which applications for program management positions are not accepted, positions are not posted, and department managers consider employees based on their skills and current job responsibilities. Mot. at 6-7; Leahy Dep. at 115; Overman Dep. at 50-51; Armor Dep. at 145. Considering this structure, it would be illogical to require Plaintiff to formally apply for a specific program

management position in order to satisfy the second prong of her prima facie case. As in *Elguindy*, Plaintiff has repeatedly expressed her desire for promotion, making Defendant aware of this desire. *See* Slyke Doc. 286, 1998 Performance Appraisal ("Lack of promotion to code 36 was discussed. Kevin will work with Karin this year to provide job opportunities which will warrant the code 36 job description. This included discussions of program/project management jobs"); Davis Dep. at 37 ("[W]e discussed what her desire would be . . . in terms of program and program opportunities"); Leahy Dep. 51-52 ("The discussion was specifically regarding Band 35 and whether or not that was a dead end, that it would preclude her future advancement to Band 3 [Code 36 and above]. I explained to her that it was not a dead end and that Band 35 was a position from which you could continue to be developed and be a candidate for further promotion").

Defendant admits its awareness of Plaintiff's continued interest in promotion by acknowledging that Plaintiff's department managers "actively worked with [P]laintiff to identify performance objectives and responsibilities on particular programs that would provide her with management opportunities." Mot. at 11. Moreover, Plaintiff repeatedly accepted positions that her department managers represented as leading to promotion opportunities, such as her positions on CyroRadar and RTIP. *See* Mot. at 12, 13. Thus, following the rationale in Elguindy, the court finds that it is reasonable to infer from Plaintiff's repeated expressions of interest in promotion and her initial acceptance of positions with the potential of leading to promotions that Plaintiff would have applied for (and accepted) a program management position had she been aware of one.

Plaintiff has also satisfied the third prong of her prima facie case, as the record adequately establishes that she was qualified for the management positions to which Reid,

Capelle and Tranchini were promoted. As noted above, Defendant admits to repeatedly placing Plaintiff in positions that Defendant claims had promotion possibilities, such as CyroRadar and RTIP. *See* Mot. at 12, 13. Moreover, Plaintiff's department manager, Mr. Leahy, testified that Plaintiff was capable of holding the positions Mr. Reid held. Leahy Dep. at 144. In regards to the duties pertaining to Mr. Capelle's position, Mr. Leahy testified that, "[Plaintiff's] technical background would have made the project more of [a] challenge for her but yeah, she could have handled that." *Id.* at 145.[7]

Assuming, as reasoned above, that Plaintiff meets the first three prongs of her prima facie case of failure to promote, Plaintiff must also establish that she was repeatedly rejected for advancement under circumstances giving rise to an inference of unlawful discrimination. This burden, as with the other elements of the prima facie case is not onerous. *See Burdine*, 450 U.S. at 253; *Young v. Lehman*, 748 F.2d 194, 197 (4th Cir. 1984)("burden of establishing a prima facie case is not a heavy one" and is a "relatively easy test"). That the promotions in 1997 and 1998 went to men, though Plaintiff "applied" and was qualified for management positions, is enough evidence for Plaintiff to meet this relatively easy burden. *See Emmel v. Coca-Cola Bottling Co.*, 95 F.3d 627, 629 (7th Cir. 1996) (inference of discrimination exists where a plaintiff establishes that she was in a protected class; that she was qualified for the promotion; that she did not receive

[7] Though Defendant is correct that there is no record of any of Plaintiff's managers "conceding" that Plaintiff could have done Tranchini's work, Defendant draws an invalid conclusion from that fact. Regardless of whether there is evidence that Plaintiff could have done Tranchini's job specifically, the record clearly demonstrates that Defendant apparently believed Plaintiff was qualified for management positions, as it repeatedly placed her on assignments with "promotional opportunities." *See* Mot. at 14.

the promotion despite her qualifications; and that a person not in the protected class was promoted instead) (*citing McDonnell Douglas*, 411 U.S. at 802).

2. Defendant's Legitimate Nondiscriminatory Reason and Plaintiff's Burden of Demonstrating Pretext

Assuming Plaintiff has met her initial burden, the burden then shifts to Defendant to provide a legitimate, nondiscriminatory reason for failing to promote Plaintiff. *See Burdine*, 450 U.S. at 253, 256. Defendant proffers that the men promoted were better qualified than Plaintiff for the positions. *See* Mot. at 33-34. As Defendant correctly argues, "[j]ob performance and relative employee qualifications are widely recognized as valid, non-discriminatory bases for any adverse employment decision." *Evans*, 80 F.3d at 960. Plaintiff, relying on various decisions from courts outside this Circuit, counters that Defendant is not entitled to use a "superior qualifications" rationale for its promotion decision where it failed to consider Plaintiff for the specific positions in question. *See* Opp. at 45-47 (*citing Lams v. General Waterworks Corp.*, 766 F.2d 386, 393 (8th Cir. 1985); *Ostroff v. Employment Exchange, Inc.*, 683 F.2d 302, 304 (9th Cir. 1982); *Nanty v. Barrows Co.*, 660 F.2d 1327, 1332 (9th Cir. 1981), *overruled on other grounds by, O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 760-61 (9th Cir. 1996); *Townsend v. WMATA*, 746 F.Supp. 178, 186 (D.D.C. 1990); *Emmel v. Coca-Cola Bottling Co.*, 95 F.3d 627 (7th Cir. 1996); *Joshi v. Fla.State Univ. Health Ctr.*, 763 F.2d 1227, 1235 (11th Cir. 1985)). Plaintiff's reliance on these decisions is misplaced, however, as the cases relied upon are factually distinct from the case at hand. For example, in Lams, black employees suing under a failure to promote theory were segregated into one work unit of the company and were never told, even when they inquired, of promotion opportunities in other work departments so that they could be considered for such promotions. In both *Ostroff* and *Nanty*, the Ninth

Circuit resolved cases involving fact situations in which the defendants had no knowledge of plaintiff's qualifications whatsoever and, upon inquiry into job availability, the plaintiff was told that there were no available positions, though, in fact, one existed. Moreover, the Ninth Circuit in *Ostroff*, citing its prior decision in Nanty, indicated that the rule stated by the plaintiff applies only where a defendant "had no knowledge of, and no way of evaluating, [the plaintiff's] qualifications." 660 F.2d at 1332. In the present case, Plaintiff was not segregated in any way from those she identified as comparators. Furthermore, the record demonstrates that Defendant had knowledge of Plaintiff's qualifications, as it had hired her and repeatedly met with her to discuss positions in accord with her qualifications and skills. *See* Davis Dep. at 37-38; Mot. at 10-11 ("ARAD employees would discuss performance and promotion objectives with Mr. Davis during a yearly performance review"; "Mr. Davis's practice was to assist the employee in identifying objectives and program opportunities consistent with the employee's goals and demonstrated ability").

In *Townsend*, the United States District Court for the District of Columbia held that the defendant was not entitled to a "superior qualifications" explanation because it was evident that the defendant had "improperly and prematurely eliminated the plaintiff from consideration for the [promotion] vacancy" by denying the plaintiff an interview where the interview process was "a very important part of the applicant screening process." 746 F.Supp. at 181. Moreover, it was evident that the plaintiff had been prematurely eliminated as company documentation indicated that another candidate had been selected for the position, though the plaintiff was told thereafter that the position remained open and no final appointments had been made. *Id.* at 179-80. In the present case, there was no similar interview process, nor was there the deception as to the status of the selection process.

Plaintiff's reliance on *Emmel* is also misplaced as the facts there demonstrated that the defendant failed to raise its particular explanation for its failure to promote the plaintiff until trial. Under those facts, the Court did not disrupt the jury's finding that the particular explanation was pretextual and created post-hoc. 95 F.3d at 634.

Finally, the facts of *Joshi* are also crucially distinct from Plaintiff's case. In *Joshi*, the plaintiff's written application was repeatedly not considered for available job positions by those with decision making power. The Eleventh Circuit found that the plaintiff's qualifications were not known or considered by the relevant decision makers and, thus, the defendant was not entitled to a "superior qualifications" explanation. 763 F.2d at 1235. Here, as previously explained, the decision makers were clearly aware of Plaintiff's skills and qualifications.

Defendant's "superior qualifications" explanation, therefore, constitutes a legitimate, non-discriminatory reason for its failure to promote Plaintiff. Thus, the burden shifts back to Plaintiff to demonstrate that Defendant's proffered reason is false and merely pretextual. *See Reeves*, 120 S. Ct. at 2106. Plaintiff fails to satisfy this burden, as her two attempted methods of demonstrating pretext prove inadequate. First, Plaintiff attempts to demonstrate pretext by reference to statistical data. As this Court found in a recent failure to promote case, "statistical evidence has little, if any, relevance in an individual disparate treatment action." *Bostron v. Apfel*, 104 F.Supp.2d 548 (D. Md. 2000) (*citing McClosky v. Prince George's County, Md.*, 1996 WL 726854, at *1 (4th Cir. Dec. 18, 1996); *see also Opara v. Modern Mfg. Co.*, 434 F.Supp. 1040, 1044-45 (D. Md. 1977); and *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1131-32 (11th Cir. 1984). Moreover, in an individual disparate treatment action, as compared to a class action disparate treatment action, statistics alone are an insufficient means of demonstrating pretext. *Id.* (*citing Warren v. Hal-*

stead Industries, Inc., 613 F.Supp. 499, 506 n.2 (M.D.N.C. 1985)). Even were the Court to consider plaintiff's statistical evidence, it is highly questionable as to whether the proffered evidence would support a finding of pretext. Although Plaintiff is correct that the evidence demonstrates that Defendant was not promoting women within ESSS at the rate that it employs women in that department, the statistics offered demonstrate that women were being placed in management positions within ESSS (for which all SD&T employees, including those within ARAD, were eligible) at a percentage very near their total percentage employed within ESSS. *See* Opp. at 44 (the total percentage of women engineers employed in ESSS is 11.7%, and, in 1998, the year in which Plaintiff alleges the discriminatory promotions of Reid, Capelle and Tranchini occurred, 10% of 70 management positions were given to women engineers). The percentage difference is minimal and does not represent a significant disparity between the percentage of women promoted within ESSS and the total percentage of women making up the qualified labor pool for such promotions. Thus, Plaintiff's attempt to demonstrate pretext by reference to statistics fails.

Plaintiff, therefore, is left with the burden of demonstrating pretext by establishing that she was better qualified for the positions given to Reid, Capelle, and Tranchini.[8] The sole

---

[8] Plaintiff is correct that, under the Supreme Court's decision in *Patterson v. McLean Credit Union*, a plaintiff is not required to demonstrate that she is better qualified to demonstrate pretext. 491 U.S. 164, 187-88. Plaintiff, however, misinterprets the import of *Patterson* in the present case. In *Patterson*, the Supreme Court simply held that where the plaintiff has an alternative means of demonstrating pretext available to her, she is not required to demonstrate, in addition, that she is better qualified in order to establish pretext. *See id.* Here, as explained above, Plaintiff's sole alternative means of demonstrating pretext, i.e., by reliance on statistics, fails. Thus, having offered no other means for demonstrating pretext, Plaintiff is now left with the burden of establishing that she was better qualified for the positions given to Reid, Capelle, and Tranchini.

evidence Plaintiff offers to establish that she was better qualified is her and her husband's subjective belief as to her qualifications as compared to those of Reid, Capelle and Tranchini. *See* Opp. at 49; Pl's Decl. ¶ 30. But as the Fourth Circuit held in *Lowery v. Circuit City Stores, Inc.*, "[t]he mere assertion [by the plaintiff] that [the plaintiff] was more qualified is insufficient to establish pretext." 158 F.3d 742, 763 (4th Cir. 1998), *vacated on other grounds*, 119 S. Ct. 2388 (1999). *Accord Vaughn v. Metra Health Cos., Inc.*, 145 F.3d 197, 202 (4th Cir. 1998).

Plaintiff erroneously points to Mr. Leahy's acknowledgment of Plaintiff's ability to do the jobs that were given to the three men and her "long and successful management and leadership experience in a broad range of programs" as evidence of her superior qualifications. *See* Opp. at 49. Evaluating the record in the light most favorable to Plaintiff, Mr. Leahy's acknowledgments, as well as Plaintiff's superior performance evaluations over the years and past management and leadership experience in a broad range of programs, merely demonstrate that Plaintiff was arguably *as qualified as* the three men promoted. Such evidence does nothing to establish that Plaintiff is *more* qualified—the burden which plaintiff must satisfy at the pretext stage. Because Plaintiff fails to meet her final burden of rebutting Defendant's legitimate non-discriminatory reason by demonstrating that Defendant's proffered reason is false, her claim must fail.

III. CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment will be granted. A separate order will issue.

William M. Nickerson
United States District Judge

Dated: September 18, 2000.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action WMN-98-2791

KARIN SKOLD VAN SLYKE,

v.

NORTHROP GRUMMAN CORPORATION.

ORDER

Pursuant to the foregoing memorandum, and for the reasons stated therein, IT IS this 18th day of September, 2000, by the United States District Court for the District of Maryland, hereby ORDERED:

1. That Defendant's Motion for Summary Judgment (Paper No. 84) is GRANTED; and

2. That Plaintiff's Motion to Strike (Paper No. 88) is DENIED as moot; and

3. That Defendant's Motion to Strike (Paper No. 91) is DENIED as moot;

4. That this action is hereby CLOSED;

5. That any and all prior rulings made by this Court disposing of any claims against any parties are incorporated by reference herein and this order shall be deemed to be a final judgment within the meaning of Fed. R. Civ. P. 58; and

6. That the Clerk of the Court shall mail or transmit copies of the foregoing memorandum and this order to all counsel of record.

_____

William M. Nickerson
United States District Judge

(2)

No. 01-937

Supreme Court, U.S.
FILED
FEB 1 2002
CLERK

IN THE

Supreme Court of the United States

KARIN SKOLD VAN SLYKE,
Petitioner,

v.

NORTHROP GRUMMAN CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

JAMES J. KELLEY
Counsel of Record
ROBYN B. WEISS
MORGAN, LEWIS & BOCKIUS, LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 739-5095

Counsel for Respondent
Northrop Grumman Corporation

February 1, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

21R

QUESTION PRESENTED

Whether the Court of Appeals erred in finding that Northrop Grumman has set forth a legitimate non-discriminatory reason for not promoting Petitioner to a Code 36 in 1997.

RULE 29.6 STATEMENT

Northrup Grumman Corporation is a publicly held corporation, but does not have any publicly held parents, subsidiaries or affiliates.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
ARGUMENT	4
I. THE COURT OF APPEALS' DECISION DID NOT DEPART FROM EEO JURISPRUDENCE OR CONFLICT WITH DECISIONS BY OTHER CIRCUIT COURTS	5
A. The Factual Record Demonstrates That All Of The Promotion Decisions Relevant To This Case Were Based On Job Related Performance Qualifications	5
B. Van Slyke's Petition Ignores The Lower Courts' Thorough Legal Analysis And Relies On Inapplicable Case Law	7
1. The Lower Courts Examined Northrop Grumman's Motivation As Part Of Its Burden-Shifting Analysis And Van Slyke Presented No Evidence To Override The Company's Legitimate Non-Discriminatory Reason	7
2. The Lower Courts Had No Obligation To Consider Van Slyke's Cited "EEO Jurisprudence."	8
a. The "after-acquired" evidence cases do not apply to this matter	10
b. The "lack of information" cases also do not apply to this matter	11

TABLE OF CONTENTS—Continued

Page

II. VAN SLYKE CANNOT OBTAIN SUPREME COURT REVIEW OF HER ALLEGED "EVIDENCE" OF PRETEXT 12

III. VAN SLYKE PRESENTS NO BASIS FOR SUPREME COURT MONITORING OF THE FOURTH CIRCUIT 13

CONCLUSION 14

TABLE OF AUTHORITIES

FEDERAL CASES	Page
Celotex Corp. v. Catrett, 477 U.S. 317 (1986)	8
Eastland v. Tennessee Valley Authority, 704 F.2d 613 (11th Cir. 1984)	9
Egbuna v. Time-Life Libraries, Inc., 153 F.3d 184 (4th Cir. 1998)	11
Equal Employment Opportunity Commission v. Alton Packaging Corp., 901 F.2d 920 (11th Cir. 1990)	9
Evans v. Technologies Applications & Servs. Co., 80 F.3d 954 (4th Cir. 1996)	3
Hill v. Seaboard C.L.R. Co., 767 F.2d 771 (11th Cir. 1985)	9
Joshi v. Florida State University Health Ctr., 763 F.2d 1227 (11th Cir. 1985)	9
Lams v. General Waterworks Corp., 766 F.2d 386 (8th Cir. 1985)	9
Mardell v. Harleysville Life Insurance Co., 31 F.3d 1221 (3d Cir. 1994)	9, 10
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	7
McKennon v. Nashville Banner Public Co., 513 U.S. 352 (1995)	8-9, 10
Miller v. AT&T Corp., 250 F.3d 820 (4th Cir. 2001)	10-11
Nanty v. Burrows Co., 660 F.2d 1327 (9th Cir. 1981)	9
Nguyen v. Dalton, 519 U.S. 1045 (1996)	13
Ohio Forestry Association, Inc. v. Sierra Club, 523 U.S. 726 (1998)	10
Patterson v. McLean Credit Union, 491 U.S. 164 (1989)	3, 12
Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000)	8, 12

TABLE OF AUTHORITIES—Continued

	Page
Rowe v. Marley Co., 233 F.3d 825 (4th Cir. 2000)	12
Russell v. Microdyne Corp., 65 F.3d 1229 (4th Cir. 1995)	8, 11
Sabree v. United Brotherhood of Carpenters and Joiners Local No. 33, 921 F.2d 396 (1st Cir. 1990)	9, 10
St. Marys Honor Ctr. v. Hicks, 509 U.S. 502 (1993)	8
Taylor v. Virginia Union University, 528 U.S. 1189 (2000)	13
Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981)	8
Young v. Lehman, 748 F.2d 194 (4th Cir. 1985)	7
OTHER	
Supreme Court Rule 10	12

IN THE

Supreme Court of the United States

No. 01-937

KARIN SKOLD VAN SLYKE,

Petitioner,

v.

NORTHROP GRUMMAN CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent, Northrop Grumman Corporation, develops and produces sophisticated electronic systems for the nation's defense, civil aviation and other domestic and international applications. Petitioner Karin Skold Van Slyke was an engineer with Northrop Grumman for twenty-two years, the last three with the Advanced Radar and Avionics Department. During her tenure, prior to her voluntary resignation, Northrop Grumman promoted Van Slyke at least four times, and she advanced from an entry level engineer in the Graduate Student Program to a project management position at grade level "Code 35." Van Slyke brought this action because she did not advance to a "Code 36" program management position in 1997, and three men received such a promotion, allegedly in preference to her.

Despite her present suggestion, Van Slyke **did not seek** the specific Code 36 positions awarded to the three men she identified in discovery as her "comparators." She sought promotion to a Code 36 generally. Northrop Grumman did not promote Van Slyke to a Code 36 because she failed to demonstrate adequate qualifications for a management code in performing her own job assignments. The promotion of three men to Code 36 positions did not affect her promotional opportunities in any way. Nor did Van Slyke's failure to receive a Code 36 upgrade in 1997 adversely affect her promotion potential any time thereafter.

At senior management levels, Northrop Grumman does not employ a competitive promotion system for a grade level assignment based on comparisons of contenders for a set number of managerial positions. Rather, the grade level assigned to a particular position depends on the nature of the work performed and its associated degree of responsibility. The Company predicates selection for its higher management grades, such as Code 36, on whether an employee has "earned" the higher wage rate, by demonstrating sustained, superior performance and proven management ability in a particular job assignment. The Company thus reviews individual employees for promotion in the general context of their qualification for and contribution to a specific job, but not based upon one-to-one comparisons of employees.

As detailed by the lower courts, Van Slyke had at least two opportunities to demonstrate the level of performance required for upgrade to Code 36, in jobs she undertook in consultation with her managers to "earn" her promotion. She chose to withdraw from both of those positions, rather than complete the demanding work required for the desired promotion.

Although the Company did not engage in a one-to-one comparison of Van Slyke to the three men whom she identifies as comparators, she relies on the Company's promotion

of these three men into unrelated positions as evidence of gender discrimination. Van Slyke, however, adduced no evidence regarding the three comparators and admitted in discovery that she did not know the jobs held by any one of them at the time of their promotions or the duties required of even one of the three positions. Van Slyke's three male comparators received Code 36 positions because, unlike Van Slyke, they demonstrated the management ability and superior performance necessary for achieving a management code in their respective jobs.

The only rationale that has ever motivated Northrop Grumman's promotion decisions is the qualification of an employee for a senior level position as demonstrated by prior sustained performance **in that job**. There is no record evidence to the contrary. The qualification justification for promotions articulated by Northrop Grumman for the Advanced Radar and Avionic Department, which produces the most technologically sophisticated radar products in the market, is presumptively appropriate and non-discriminatory. *See Evans v. Technologies Applications & Servs. Co.*, 80 F.3d 954, 960 (4th Cir. 1996) ("Job performance and relative employee qualification are widely recognized as valid, non-discriminatory bases for any adverse employment decision."); *see also Patterson v. McClean Credit Union*, 491 U.S. 164, 187 (1989) (finding employee qualifications a legitimate non-discriminatory reason).

Van Slyke's assertion that Northrop Grumman cannot defend its promotions of these three men is factually and legally wrong. First, she ignores the means by which employees earn promotions—by demonstrating management ability and sustained, superior performance in their positions. Second, Van Slyke ignores the fact that Northrop Grumman relied upon the qualifications of these three men for their specific jobs when making the decisions to promote them. Third, there is no evidence that these three promotion

decisions had any bearing on her failure to earn a promotion. To posit the argument as a narrow comparison of "relative qualifications" in which Van Slyke was "admittedly not considered" is an exercise in legal sophistry. The district court and the court of appeals were correct, and summary judgment was granted appropriately.

ARGUMENT

This case involves the application of established law to a discrete set of facts. The district court correctly applied the established law and ruled that there was no dispute of material fact requiring trial and that, on the record, Northrop Grumman was entitled to judgment as a matter of law. The court of appeals accepted and adopted the district court's factual findings and found no error in its legal conclusions. Van Slyke presents no legal issue that warrants review in this Court. There is no conflict among the circuits for this Court to decide. Nor does the outcome of her case depend on an unresolved issue of federal law.

Van Slyke relies on three unpersuasive arguments to support her petition for review: (1) she claims that the court of appeals failed to consider applicable "EEO jurisprudence"; (2) she insists that she presented adequate evidence of pretext; and (3) she maintains that this Court needs to rein in the "parsimonious" Fourth Circuit. None of her arguments present a legitimate basis for this Court to grant certiorari.

The court of appeals had no reason to address the "EEO jurisprudence" concerning pretext cited by Van Slyke. Both the factual record and the thorough legal analysis conducted by the lower courts in this case demonstrate that Northrop Grumman's decision to award a Code 36 to the three male employees was motivated by their respective qualifications for a specific position as demonstrated by sustained performance in their particular jobs. The court of appeals

has not "sanctioned a deviation," (Pet. 14) from established precedent regarding motivation; it has expressly adopted such precedent in **appropriate** cases.

Her second and third arguments likewise provide no basis for review. She presents no legal theory that would permit this Court to overrule the lower courts' assessment of the evidentiary record regarding pretext. In addition, her challenge to the court of appeals' "approach" to anti-discrimination cases is wholly without merit.

I. THE COURT OF APPEALS' DECISION DID NOT DEPART FROM EEO JURISPRUDENCE OR CONFLICT WITH DECISIONS BY OTHER CIRCUIT COURTS.

Van Slyke argues that the court of appeals departed from this Court's precedent, in conflict with the holdings of five circuit courts, by permitting Northrop Grumman to rely on an explanation—superior qualifications—that "admittedly" did not motivate it at the time the employment decisions were made. Pet. 4. Van Slyke's argument suffers from two fatal flaws. First, the undisputed facts demonstrate that qualifications—demonstrated management ability and superior performance—did motivate Northrop Grumman's promotion decisions. Second, the lower courts analyzed thoroughly the Company's asserted motivations, and Van Slyke's new "EEO jurisprudence" would not alter their legal conclusions in this case.

A. The Factual Record Demonstrates That All Of The Promotion Decisions Relevant To This Case Were Based On Job Related Performance Qualifications.

Van Slyke's petition incorrectly argues that Northrop Grumman's articulated defense (*i.e.*, superior qualifications) was not its true motivation for failing to promote her to a Code 36 because the Company did not consider Van Slyke

for the three specific positions given to her comparators. (Pet. 4-5) This argument glosses over these undisputed facts that demonstrate that Northrop Grumman's articulated defense was its true motivation, regardless of the fact that Van Slyke was not considered for the three specific positions: (1) the comparators received their promotions only after they demonstrated sustained management ability in their respective positions; (2) Northrop Grumman does not predicate consideration for promotion on a competitive promotion system based on comparisons of contenders; (3) promotion requires specific job-related experience and sustained management ability, demonstrated on the job, sufficient to warrant a Code 36; (4) Van Slyke **did not seek** the three positions given to her comparators; (5) Van Slyke never held the jobs assigned to the three comparators, and she could not even identify the jobs; (6) the relevant decision makers repeatedly placed Van Slyke in positions where successful performance would lead to a Code 36; and (7) Van Slyke failed to capitalize on the opportunities presented to her.

These undisputed facts lead to only one conclusion—Northrop Grumman **was motivated** by the qualifications of Van Slyke and her comparators in their respective promotion decisions. Despite Van Slyke's claim, the Company has never "admitted" otherwise. Although Northrop Grumman did not base its promotion decisions on a one-to-one comparison of Van Slyke and her three comparators, it nonetheless was motivated by consideration of the employees' specific qualifications relative to each particular job. Northrop Grumman, therefore, could properly rely upon its asserted defense.

B. Van Slyke's Petition Ignores The Lower Courts' Thorough Legal Analysis And Relies On Inapplicable Case Law.

1. *The Lower Courts Examined Northrop Grumman's Motivation As Part Of Their Burden-Shifting Analysis And Van Slyke Presented No Evidence To Override The Company's Legitimate Non-Discriminatory Reason.*

Van Slyke builds on her incorrect assertion that Northrop Grumman relied upon a rationale that did not motivate its promotion decisions and claims that this Court has not addressed whether an employer may respond to a prima facie case by asserting a "rationale that did not motivate it at the time the decision was made." (Pet. 9) While the error of Van Slyke's assertion itself precludes this argument, in fact, this is not an unsettled area of law. The burden shifting analysis applicable to Title VII matters, first set out by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), directly addresses this issue by requiring a plaintiff to establish the falsity of an employer's stated motivation. Under *McDonnell Douglas* and its progeny, once a Title VII plaintiff meets the "relatively easy" burden of establishing a prima facie case, *Young v. Lehman*, 748 F.2d 194, 197 (4th Cir. 1985), the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory motive for the adverse employment action at issue.

> The defendant *need not persuade the court that it was actually motivated by the proffered reasons.* It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the

> plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection.

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254-55 (1981) (emphasis added and internal citations omitted). The burden then returns to the plaintiff to demonstrate the falsity of the employer's asserted reason, *i.e.*, that the stated rationale did not actually motivate the employer's decision. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993), *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); *see also Russell v. Microdyne Corp.*, 65 F.3d 1229, 1235 (4th Cir. 1995) (explaining that in "the pure discrimination case . . . a single reason motivated the challenged decision, the parties offered different reasons, and the fact-finder was required to determine which one of the two stories was true.")

In this case, Northrop Grumman met its burden of production by introducing undisputed evidence of its motivation (*i.e.*, its decision makers relied on job performance and employee qualifications in promoting Van Slyke's three comparators and in failing to promote her). Van Slyke failed to carry her burden to raise a genuine issue of material fact to demonstrate that Northrop Grumman's stated rationale was false—that job related qualifications did not motivate the Company at the time the promotion decisions were made—and that the real reason was gender discrimination. *See Reeves*, 530 U.S. 133; *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Both lower courts found that Van Slyke failed to meet her burden. She cannot obtain review here by falsely declaring that Northrop Grumman "admittedly" was not motivated by relative qualifications. The record proves otherwise.

2. *The Lower Courts Had No Obligation To Consider Van Slyke's Cited "EEO Jurisprudence."*

Van Slyke argues that the lower courts' failure to follow the "EEO jurisprudence" set out in *McKennon v. Nashville*

Banner Pub. Co., 513 U.S. 352, 360 (1995), and other circuit court decisions, warrants Supreme Court review of her case. The lower courts, however, had no reason to apply the "EEO jurisprudence" cited by Van Slyke because it simply is inapposite.

The cases cited by Van Slyke fall into two distinct categories. In the first category of cases, the employer asserted, as a basis for an alleged discriminatory employment decision, information learned only after the fact (the "after-acquired evidence" cases).[1] In the second category of cases, the employer could not have compared employee qualifications because either the employer: (1) wrongfully excluded the plaintiff from participation in the hiring/promotion process; or (2) did not know the successful candidate's qualifications at the time it rejected the plaintiff (the "lack of information" cases).[2] Neither category applies here. As evidenced by the undisputed factual record, Northrop Grumman assisted Van Slyke in the promotion process. The Company knew at the time it promoted her three comparators that, although she was a highly regarded engineer, she had stepped back from similar promotion opportunities afforded

---

[1] *See McKennon*, 513 U.S. 352; *Sabree v. United Brotherhood of Carpenters and Joiners Local No. 33*, 921 F.2d 396 (1st Cir. 1990); *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221 (3d Cir. 1994), *vacated and remanded*, 514 U.S. 1034 (1995), *opinion reinstated in pertinent part*, 65 F.3d 1072, 1073 (3d Cir. 1995).

[2] *See Lams v. General Waterworks Corp.*, 766 F.2d 386 (8th Cir. 1985); *Nanty v. Burrows Co.*, 660 F.2d 1327 (9th Cir. 1981), *overruled on other grounds*, *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 760-61 (9th Cir. 1996); *Equal Employment Opportunity Comm'n v. Alton Packaging Corp.*, 901 F.2d 920 (11th Cir. 1990); *Hill v. Seaboard C.L.R. Co.*, 767 F.2d 771 (11th Cir. 1985); *Joshi v. Florida State Univ. Health Ctr.*, 763 F.2d 1227 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985); *Eastland v. Tennessee Valley Authority*, 704 F.2d 613 (11th Cir.), *cert. denied*, 465 U.S. 1066 (1984).

to her, and she had no sustained, successful management experience. The lower courts had no reason, therefore, to apply the "EEO jurisprudence" cited by Van Slyke.

a. The "after-acquired" evidence cases do not apply to this matter.

In her petition, Van Slyke, claims, for the first time, that the "after-acquired evidence" cases resulting from this Court's decision in *McKennon v. Nashville Banner Pub. Co.* should have controlled the court of appeals decision in this case. She did not raise this argument in the lower courts and, therefore, she cannot raise the new theory here. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 738 (1998) (rejecting Sierra Club's argument because it "suffers from the legally fatal problem that it makes its first appearance here in this Court in the briefs on the merits.") Even if these cases were properly before this Court, they do not apply to Van Slyke's appeal.

This is not an "after-acquired evidence" case. Unlike the employers in *McKennon*, *Sabree*, and *Mardell*, Northrop Grumman did not attempt to rely on new information about Van Slyke to justify its earlier employment decision. In stark contrast, Northrop Grumman had all relevant information **at the time** it made the promotion decisions at issue. Northrop Grumman's employment decisions were not motivated by discrimination, but by its assessment of the candidates' sustained, successful management performance. The court of appeals did not depart from this Court's precedent or create a conflict when it did not consider and/or address the after-acquired evidence cases, which Van Slyke never raised in the courts below and which do not apply to the facts here.

Van Slyke's claim that the court of appeals "misunderstands" this line of cases regarding motivation, or that it "has gone astray," is baseless. (Pet. 6) In decisions before this one, the court of appeals expressly adopted and relied upon the after-acquired evidence cases. *See Miller v. AT&T*

Corp., 250 F.3d 820 (4th Cir. 2001) (discussing *McKennon* and finding that the after-acquired evidence rule applied to the specific facts of the case); *Russell v. Microdyne Corp.*, 65 F.3d 1229 (4th Cir. 1995) (reversing summary judgment for employer where employer relied on "after-acquired evidence" of employee's misrepresentations on her resume to justify its earlier termination decision); *see also Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184, 188 (4th Cir. 1998) (Ervin, J., dissenting[3]) (stating that "the pertinent question in anti-discrimination cases is whether the employer was motivated by discriminatory animus at the time of the adverse employment action against the employee.")

b. The "lack of information" cases also do not apply to this matter.

Under this line of argument, Van Slyke relies on a series of cases which reject a relative qualifications defense where the employer at issue either: (1) prevented the plaintiff from participating in the hiring/promotion process and made no valid qualifications-based decision; or (2) did not know of the successful candidate's qualifications when it rejected the plaintiff. Neither circumstance is present here. As the district court held, Van Slyke was fully engaged in the Northrop Grumman promotion process, (Pet. App. B, 17a), and her supervisors were fully aware of her qualifications. *Id.* Indeed, Van Slyke had already failed to prove herself in two assignments before two of her comparators were upgraded. There is no basis on this record for the courts below to have applied either the "after acquired evidence" or "lack of information" lines of authority.

---

[3] Circuit Judge Ervin wrote the unanimous opinion in *Russell*, 65 F.3d 1229, reversing the lower court's granting of summary judgment in an after-acquired evidence case. Plaintiff's successful counsel in *Russell* represents the Petitioner in this matter.

II. VAN SLYKE CANNOT OBTAIN SUPREME COURT REVIEW OF HER ALLEGED "EVIDENCE" OF PRETEXT.

Van Slyke's disagreement with the lower courts' assessment of her "evidence" of pretext does not warrant review here. The district court considered all of Van Slyke's evidence and gave her the benefit of all reasonable inferences. Then the court ruled that the quantum of evidence did not satisfy Van Slyke's burden at the pretext stage. Pet. App. B, 21a. On appeal, Van Slyke argued that the district court ignored her "evidence" of pretext. The Fourth Circuit rejected this argument and upheld the district court's evidentiary assessment. (Pet. App. A, 6a-7a) Nevertheless, she continues to insist that she has evidence of pretext that should go to a jury. (Pet. 18)

This Court does not grant certiorari to provide an unsuccessful party with another chance to lay out the facts. Rather, the petitioner must demonstrate that the court of appeals has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10. In the present case, the lower courts did not ignore *Patterson v. McLean Credit Union*, 491 U.S. 164, 187-88 (1989) or restrict Van Slyke's ability to prove pretext. Nor did the district court fail to follow the holding in *Reeves*. The district court considered **all** of Van Slyke's "evidence," and found it insufficient to rebut the stated rationale for Northrop Grumman's employment decisions. Accordingly, neither *Patterson* nor *Reeves* "affect the outcome of this case. Rather, it is [Van Slyke's] failure to demonstrate pretext . . . that dooms [her] claims." *Rowe v. Marley Co.*, 233 F.3d 825, 831 (4th Cir. 2000).

III. VAN SLYKE PRESENTS NO BASIS FOR SUPREME COURT MONITORING OF THE FOURTH CIRCUIT.

Finally, Van Slyke argues for Supreme Court review because the Fourth Circuit sometimes takes "a parsimonious approach" to discrimination cases. (Pet. 18) As support for her claim, she cites to five cases where the Supreme Court has reversed the Fourth Circuit. *Id.* Unmentioned is the fact that the Supreme Court has denied certiorari more than 100 times in employment discrimination cases from the Fourth Circuit during the same period. This Court's reversal of a literal handful of Fourth Circuit decisions does not warrant special scrutiny of the Circuit's "EEO jurisprudence."

The instant case involves a simple failure to promote claim. The Supreme Court has refused, without opinion, to review the Fourth Circuit's decisions in similar cases. *See e.g.*, *Taylor v. Virginia Union Univ.*, 528 U.S. 1189 (2000) (denying review of Fourth Circuit decision rejecting, *inter alia*, plaintiff's gender discrimination failure to promote claim); *Nguyen v. Dalton*, 519 U.S. 1045 (1996) (denying review of Fourth Circuit decision rejecting plaintiff's age, gender, race and national origin failure to promote claim). This Court should likewise deny Van Slyke's petition for certiorari and reject her baseless attack of the Fourth Circuit's handling of discrimination cases.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JAMES J. KELLEY
Counsel of Record
ROBYN B. WEISS
MORGAN, LEWIS & BOCKIUS, LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 739-5095
Counsel for Respondent
Northrop Grumman Corporation

February 1, 2002

Supreme Court, U.S.
FILED
FEB 11 20
CLERK

(3)

No. 01-937

IN THE

Supreme Court of the United States

KARIN SKOLD VAN SLYKE,
Petitioner,

v.

NORTHROP GRUMMAN CORPORATION.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY BRIEF

DOUGLAS B. HURON *
PHILIP J. SIMON
HELLER, HURON, CHERTKOF
LERNER, SIMON & SALZMAN
1730 M Street, N.W.
Suite 412
Washington, DC 20036
(202) 293-8090

* Counsel of Record

Attorneys for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

13pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. THE RECORD	2
II. THE DEPARTURE FROM THIS COURT'S PRECEDENT	5
CONCLUSION	10

TABLE OF AUTHORITIES

CASES	Page
Eastland v. Tennessee Valley Authority, 704 F.2d 613 (11th Cir.), *cert. denied*, 465 U.S. 1066 (1984)	7
Joshi v. Florida State University Health Center, 763 F.2d 1227 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985)	7, 8
Lams v. General Waterworks Corp., 766 F.2d 386 (8th Cir. 1985)	8
McKennon v. Nashville Banner Pub. Co., 513 U.S. 352 (1995)	1, 6
Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)	1, 6
Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000)	9
Sabree v. United Brotherhood of Carpenters and Joiners Local No. 33, 921 F.2d 396 (1st Cir. 1990)	7, 8
Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981)	*passim*

IN THE

Supreme Court of the United States

No. 01-937

KARIN SKOLD VAN SLYKE,

Petitioner,

v.

NORTHROP GRUMMAN CORPORATION.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY BRIEF

The Court of Appeals has sanctioned an abrupt departure from this Court's Title VII jurisprudence. The law is unambiguous: after a plaintiff establishes a prima facie case of discrimination, the defendant employer has the burden of "clearly set[ting] forth . . . the reasons for the plaintiff's rejection." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). This burden is one of production, not persuasion, but the focus must be on the defendant's motivation "at the time of the decision" under challenge. *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 360 (1995), *quoting Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989). In particular, a *post hoc* justification will not suffice. *See id.* ("'proving that the same decision would have been justified . . . is not the same as proving that the same decision would have been made'").

In the present case, Northrop Grumman flouted this precedent by asserting a defense that plainly—admittedly—did not motivate company officials "at the time of the decision." Instead, Northrop fashioned a *post hoc* rationale for its conduct. The district court acquiesced and the Fourth Circuit affirmed, becoming the only Court of Appeals to permit such a temporally deficient defense in a Title VII case.

I. THE RECORD

In 1997 Northrop Grumman promoted three men to Code 36 program management positions in petitioner Karin Van Slyke's department. Van Slyke was the only woman among the 30 engineers in the department, and she was also the only engineer denied Code 36 status.

Surveying the record, the Court of Appeals noted that Northrop "concede[d] that Van Slyke . . . was not considered" for the jobs to which the men were promoted in 1997. Pet. App. A, 4a. This was true even though Northrop "knew Van Slyke sought a Code 36 promotion," *id.*, 2a, and "concede[d] that [she] could have held the specific positions" given to the three men. *Id.*, 4a.

Northrop cannot deny these facts. Instead, it bobs and weaves, on occasion resorting to sleight of hand. Twice, for example, the company announces in bold type that Van Slyke "did not seek" the positions awarded the three men. Brief in Opposition (Br. Opp.) 2, 6. True, but neither did the men. As the district court observed, Northrop "admits that it has a very informal promotion structure in which *applications for program management positions are not accepted, positions are not posted,* and department managers consider employees based on their skills and current job responsibilities." Pet. App. B, 16a (emphasis supplied).

In short, Northrop did not post Code 36 positions, so no one applied for them. Instead, management reached out and

tapped employees for promotion to Code 36. And in Van Slyke's department, all 29 men had been anointed in this fashion; only she was overlooked.

Northrop concedes that its managers did not compare Van Slyke's qualifications with those of the men when deciding whom to promote to Code 36 positions in 1997. Br. Opp. 6 ("Northrop Grumman did not base its promotion decisions on a one-to-one comparison" of Van Slyke and the three men). Indeed, much of its brief is an effort to excuse that failure of comparison. In the courts below, however, Northrop presented an unvarnished "superior qualifications" defense predicated on the very comparison of credentials that it now tries to downplay: "Defendant proffers that the men promoted were better qualified than Plaintiff for the positions." Pet. App. B, 19a. The company cannot back away from this defense just because its *post hoc* character is now evident.

In any event, there is no support in the record for Northrop's attempt to justify its admitted failure to consider Van Slyke for the three Code 36 positions filled in 1997. For example, the company writes as if elevation to Code 36 were a promotion in place in the same job. No citation is offered for this proposition, and it is not so. Code 36 embraces discrete program management positions, in which the incumbents are responsible for running one of the company's defense or civil aviation projects. *See* Pet. App. A, 2a. Openings arise in specific positions at the Code 36 level but, as noted previously, these vacancies are not posted. For this reason, the district court said that Van Slyke did not have to "formally apply for a specific program management position" in order to demonstrate her interest in promotion to Code 36, Pet. App. B, 16a-17a, since she "would have applied for (and accepted) a program management position had she been aware of one." *Id.*, 17a. Code 36 management positions are distinct from lower rated jobs; they are simply not advertised.

Northrop stresses that the three men promoted to Code 36 positions in 1997 were assessed for promotion based in part on their performance in their own jobs. But that is hardly noteworthy; every employer bases its promotion decisions (at least in part) on its employees' performance in their current positions. The salient fact, which is undisputed, is that the company's managers did not compare Van Slyke's performance in *her* job with that of the men when making promotion decisions in 1997. Similarly, the noncompetitive nature of Northrop's management promotion system, which the company highlights, means only that Code 36 positions were not formally posted for competition; it does not mean that its managers could not compare the credentials of likely candidates. Indeed, Northrop's defense below was founded on the notion that such comparisons were made. But if in fact the men were competing only against themselves in 1997, this simply confirms the *post hoc* nature of the company's "superior qualifications" rationale for rejecting Van Slyke's promotion.

Early in its brief, Northrop makes the baffling assertion that "[t]he promotion of three men to Code 36 positions did not affect [Van Slyke's] promotional opportunities in any way," either in 1997 or at "any time thereafter." Br. Opp. 2. But this case is about the three Code 36 positions filled by men in 1997. It is undisputed that Van Slyke made a prima facie showing that her rejection *for those jobs* was the product of sex discrimination. In these circumstances, Northrop's burden was to "clearly set forth, through the introduction of admissible evidence, the reasons for [Van Slyke's] rejection" for the positions filled in 1997. *Burdine*, 450 U.S. at 254. Talk of the possibility of promotion to *other* jobs does not satisfy this burden.

Nor is Northrop's case helped by the company's persistent disparagement of Van Slyke's capabilities. As the Court of Appeals observed, Northrop has "concede[d] that Van Slyke could have held the specific positions" given to the men.

App. A, 4a. And the district court, pointing to Van Slyke's "superior performance evaluations over the years and past management and leadership experience in a broad range of programs," said that she was "arguably *as qualified as* the three men promoted." App. B, 23a (emphasis in original).

As noted above, much of Northrop's brief is a misguided effort to justify the company's admitted failure to consider Van Slyke for the Code 36 jobs filled in 1997. At times, though, Northrop shifts gears and suggests that Van Slyke was in fact considered for those positions. *See* Br. Opp. 8 (saying that the company "relied on job performance and employee qualifications in promoting [the three men] and in failing to promote her"). Yet two pages earlier, Northrop concedes—as it must—that Van Slyke was *not* considered for these three jobs. *See id.* at 6 (referring to "the fact that Van Slyke was not considered for the three specific positions").

The record is clear. In the courts below, Northrop "concede[d] that Van Slyke . . . was not considered" for the three jobs at issue. Pet. App. A, 4a. No amount of straining can overcome the admitted fact that Northrop Grumman did not consider Karin Van Slyke for the three Code 36 positions filled by men in 1997.

Northrop prevailed in this case by asserting in the district court that "the men promoted were better qualified than Plaintiff for the positions" at issue. Pet. App. B, 19a. But that was not—could not have been—the motivation of Van Slyke's managers "at the time of the decision," since they did not even consider her for the three Code 36 jobs in question. Northrop's explanation is a quintessential *post hoc* defense.

II. THE DEPARTURE FROM THIS COURT'S PRECEDENT

This Court's precedent is clear: a Title VII defendant may not respond to a prima facie case under *Burdine* by asserting a rationale that did not motivate it at the time of the

challenged decision. Northrop does not appear to dispute the vitality of this principle, saying "this is not an unsettled area of the law." Br. Opp. 7.

The company quibbles about petitioner's citation of such cases as *McKennon, supra*, since the present case is not about "after-acquired evidence." In *McKennon*, however, the Court held that information acquired by a company *after* making an allegedly discriminatory decision does not affect its liability for that action. And this is precisely because liability is gauged by the defendant's motivation "at the time of the decision." *McKennon*, 513 U.S. at 360, *quoting Price Waterhouse v. Hopkins*, 490 U.S. at 252. This is a bedrock Title VII principle, and it applies here. It precludes Northrop from arguing that the men promoted to three Code 36 positions were better qualified than Van Slyke for those jobs, when the responsible officials did not consider her at the time they filled the positions in 1997.

Northrop says repeatedly that the three men promoted were qualified for their new positions. Even if true, that assertion—by itself—does not meet the standard imposed by *Burdine*, under which "the defendant must clearly set forth . . . the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant." 450 U.S. at 254 (footnote omitted). An explanation grounded on qualifications is not "legally sufficient to justify a judgment for the defendant" if it speaks solely to the credentials of the man chosen; the decision-maker necessarily must also say that he thought that the man was better qualified than the woman rejected for the job at hand. This is only a burden of production; it is not onerous and Title VII defendants routinely satisfy it. But in the present case, Van Slyke's managers could not say that they believed in 1997 that the men chosen for promotion were better qualified than she was, because they admitted that they did not

consider her at all. Facing this quandary, Northrop fashioned a *post hoc* "superior qualifications" defense, and the courts below erred in accepting it.

Apart from the Fourth Circuit here, the other Courts of Appeals have followed this Court's lead and have not allowed Title VII defendants to assert defenses that did not animate them "at the time of the decision." *See* cases cited at page 6 of the Petition. Northrop attempts to distinguish some of these decisions, but they are apposite.

For example, in *Joshi v. Florida State University Health Center*, 763 F.2d 1227 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985), the decision-makers were generally aware of the plaintiff's qualifications, because she had earlier applied for other positions. She had not, however, been considered for the job at issue. As Van Slyke did here, the plaintiff established a prima facie case of sex discrimination, and the defendant responded—as Northrop did—by asserting "that the males hired or offered the position were at least as qualified as she." *Id.* at 1235. This explanation did not pass muster under *Burdine*:

> [the] articulated reason is insufficient as a matter of law. * * * Because [plaintiff] was not considered, her qualifications were not compared to those of the male applicants and hence, the relative qualifications of those applicants cannot be a reason for the defendants' failure to hire her.

Id.

The Eleventh Circuit in *Joshi* cited its earlier decision in *Eastland v. Tennessee Valley Authority*, 704 F.2d 613 (11th Cir.) *cert. denied*, 465 U.S. 1066 (1984), in which the court relied on *Burdine* and ruled that the defendant's "decision cannot be defended on the basis of the relative qualifications of the applicants if these qualifications were not considered." *Id.* at 626. In similar fashion, the First Circuit in *Sabree v.*

United Brotherhood of Carpenters and Joiners Local No. 33, 921 F.2d 396 (1st Cir. 1990), held that "a defendant may not invent a *post hoc* rationalization for its actions * * * Unless, therefore, a defendant articulates a 'legitimate non-discriminatory reason' that *actually* motivated the decision, the reason is legally insufficient." *Id.* at 404 (emphasis in original). And in *Lams v. General Waterworks Corp.*, 766 F.2d 386 (8th Cir. 1985), in which the plaintiffs "never were actually considered for the positions in dispute, and thus were not compared with the successful candidates," *id.* at 391, defendant's "*post hoc* comparisons" did not suffice. *Id.* at 393.

Except for the Fourth Circuit here, the Courts of Appeals understand that a Title VII defendant responding to a prima facie case must articulate "a 'legitimate non-discriminatory reason' that *actually* motivated the decision." *Sabree*, 921 F.2d at 404 (emphasis in original). Otherwise, "the reason is legally insufficient." *Id.* In *Joshi* and *Lams*, the courts made factual findings that the plaintiffs were not considered for the positions at issue. *See* 763 F.2d at 1235 ("[t]he district court found that 'the plaintiff was not actively considered for hiring' "); 766 F.2d at 391 ("the evidence distinctly shows that plaintiffs never were actually considered for the positions in dispute"). In the present case, Northrop has conceded this dispositive fact. The result is the same: "Because [Van Slyke] was not considered, her qualifications were not compared to those of the [three promoted men] and hence, the relative qualifications of [the men] cannot be a reason for [Northrop's] failure to [promote] her." *See Joshi*, 763 F.2d at 1235.

The defendant's burden of production under *Burdine* is modest, and most employers easily satisfy it. But this Court anticipated that the burden would not always be met, *see* 450 U.S. at 254, and that is the case here.

Finally, the focus of this Petition is on the first question presented—*i.e.*, whether a "superior qualifications" defense is available to an employer who did not in fact engage in comparison of credentials. The answer is quite clearly "no," as Northrop appears to agree. But even assuming that the company was entitled to assert this defense, summary judgment in its favor was manifestly improper, since the district court said that the record would support a finding that Van Slyke was as qualified as the men promoted to Code 36, and her rejection occurred in a setting in which all 29 men in her department had been accorded Code 36 status. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-51 (2000) (a court considering summary judgment "must draw all reasonable inferences in favor of the [employee]" and "must disregard all evidence favorable to the [employer] that the jury is not required to believe").

The *Reeves* issue is the second question presented by this Petition. This Court need not reach it, though, because Northrop was not entitled to a "superior qualifications" defense in the first instance.

Northrop says that this is an ordinary Title VII case. But it is far from ordinary in its misapplication of settled law. The Court of Appeals plainly erred in permitting Northrop Grumman to defend its rejection of Karin Van Slyke by asserting an explanation that did not motivate company officials "at the time of the decision." This error is so palpable that summary reversal may be appropriate.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted,

DOUGLAS B. HURON *
PHILIP J. SIMON
HELLER, HURON, CHERTKOF
LERNER, SIMON & SALZMAN
1730 M Street, N.W.
Suite 412
Washington, DC 20036
(202) 293-8090

* Counsel of Record

Attorneys for Petitioner